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I prepared the following writing sample in September 2022 as part of my work at Quinn Emanuel Urquhart & Sullivan, LLP, on a civil RICO case then pending in the U.S. District Court for the District of Puerto Rico.

The writing sample is my first draft of a motion for summary judgment. This draft is entirely my own work product and reflects no edits or comments from any other person. Because no version of this motion was ever filed publicly, I have altered the names of the parties and witnesses to preserve client confidentiality.

Questions about this writing sample can be directed to the following Quinn Emanuel attorneys who supervised me on the case for which this draft motion was prepared:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PETERSON FOUNDATION LLC and CATHERINE PETERSON, Plaintiffs, v. GREGORY DAVIS, DELTA FINANCE CORP., JACK PETERSON JUNIOR FOUNDATION LLC, and DAVIS & ASSOCIATES LLP, Defendants.	CIVIL NO. 1:17-cv-1234 **ORAL ARGUMENT REQUESTED**

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND
INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Defendants Gregory Davis; Delta Finance Corp. ("DFC"); Jack Peterson Jr. Foundation LLC ("JJ Foundation"); and Davis & Associates LLP (the "Law Firm" or "Firm") respectfully submit this Motion and Incorporated Memorandum of Law (the "Motion") pursuant to Federal Rules of Civil Procedure 56(a) and (g) to grant partial summary judgment for Defendants on the issue of $70 million in damages arising out of the RICO claims in the Complaint filed by the Peterson Family Foundation and Catherine Peterson ("Catherine," together with PFF, the "Plaintiffs") in the above-captioned action.

PRELIMINARY STATEMENT

Discovery confirmed that this $225 million case is nothing but a baseless and belated probate dispute. Plaintiffs have alleged that their family lawyer engaged in a decades-long RICO conspiracy to take control of the family's wealth by convincing a senior member of the family—non-party Jack Peterson Jr. (also known as Jack Jr.)—to leave his wealth to charity. Discovery yielded not one shred of evidence to support these claims. Plaintiffs' attempt to shoehorn their inheritance claims into a nine-figure RICO action must be rejected as both impermissible under RICO jurisprudence and beyond the jurisdiction of this Court.

First, there is no genuine issue of material fact that the $70 million that form the lion's share of Plaintiffs' damages calculations was first the property of Jack Jr., and then the property of Jack Jr.'s estate. Neither Jack Jr. nor his estate is a party in this case. RICO permits damages only to a *plaintiff's* business or property; Plaintiffs therefore cannot move forward with their claims that Defendants injured a third party's property.

Second, there is no genuine issue of material fact that Plaintiffs seek relief that, in effect, would unwind the distribution of Jack Jr.'s estate and invalidate Jack Jr.'s will. If anywhere, Plaintiffs' claims should be heard in a Commonwealth Probate Court, not here. Under the longstanding probate exception to federal jurisdiction, this Court has no power to grant the relief

that Plaintiffs desire—namely, redistributing Jack Jr.'s estate and invalidating Jack Jr.'s will in the process.

Accordingly, Defendants respectfully request that this Court enter an order pursuant to Federal Rules of Civil Procedure 56(a) and 56(g) "treating th[ese] fact[s] as established in the case" and entering summary judgment against Plaintiffs, holding that Plaintiffs' claimed damages to the property of Jack Jr. and Jack Jr.'s Estate are not recoverable as a matter of law.

STATEMENT OF UNDISPUTED FACTS

A. Relevant Factual Background

Non-parties Jack Peterson Sr. ("Jack Sr.") and his wife Anna Peterson built significant wealth over the course of their lifetimes through the success of their company, Defendant Delta Finance Corp. ("DFC"). Rule 56 Statement of Undisputed Facts ("SUF") ¶¶ 1-3. Their prosperity funded numerous philanthropic projects, through their family foundation, Plaintiff Peterson Family Foundation LLC. During their lives, the Petersons had two children: non-party Jack Peterson Jr. ("Jack Jr." or "JJ") and Plaintiff Catherine Peterson ("Catherine"). SUF ¶¶ 4-5.

For decades, Defendants Gregory Davis and his law firm, Davis & Associates LLP (the "Firm"), held central roles in managing the Peterson family wealth and governing the Peterson Family Foundation. SUF ¶¶ 6-12. Davis and his Firm did most of the family's estate planning and prepared wills for all members of the family, including Jack Sr., Anna, JJ, and Catherine. SUF ¶¶ 13-20. It is Davis and the Firm's role in this estate planning that lies at the heart of this dispute.

Jack Sr. died in the late 1980s and left all his property and possessions to his wife, Anna. SUF ¶ 21. When Anna died in 2000, she left some property to the Peterson Family Foundation and divided the rest equally among her two children, JJ and Catherine. SUF ¶ 23. Davis executed both Jack Sr.'s and Anna's wills according to their respective wishes. SUF ¶¶ 22, 24.

Catherine married and raised a family of six children and eventually eight grandchildren. Catherine raised her family to expect the same level of day-to-day comfort and luxury that Catherine herself enjoyed growing up. SUF ¶ 25. She and her husband maintained luxurious homes in some of the priciest neighborhoods in the world. SUF ¶¶ 26-28. Catherine's numerous children and grandchildren also attended elite private schools, from elementary school through post-graduate master's and professional programs. SUF ¶¶ 29-35. It was Catherine's inheritance that funded much of her family's lifestyle. When Catherine was low on funds, she sometimes drew upon "grants" from the Peterson Family Foundation to cover expenses. SUF ¶¶ 36-40. Catherine also turned to JJ several times when she found her own inheritance insufficient for cash outlays. In most cases, JJ obliged. For instance, JJ bought all of the shares in DFC that Catherine inherited to provide Catherine with the cash she desired to maintain her family's lifestyle. SUF ¶¶ 41-45. Davis and the Firm brokered and formalized several such purchases. *Id.*

By contrast, JJ never married or had children. SUF ¶ 46. JJ lived comfortably and remained involved with managing DFC. SUF ¶ 47-48. However, JJ "quietly disapprove[d]" of his sister's undisciplined spending and her reliance upon funds from the Peterson Family Foundation to make large purchases. SUF ¶ 49. Indeed, JJ's correspondence with Defendants reveals that he viewed the Peterson Family Foundation as a monument to his parents' generosity, and he saw Catherine's use of the Foundation as a betrayal of Jack Sr.'s and Anna's intent for the family foundation. SUF ¶¶ 50-60.

In 1984, JJ turned to Davis and the Firm for estate planning. In his 1984 will (the "First Will"), JJ made a handful of small specific bequests to his nieces and nephews but left the bulk of his wealth to a charitable organization to be established at JJ's death. SUF ¶¶ 61-68. The First Will left *nothing* to either JJ's sister Catherine or the Peterson Family Foundation. SUF ¶ 67. In

1999, JJ retired and instructed Davis and the Firm to form the new charitable foundation, Defendant Jack Peterson Junior Foundation LLC (commonly known as the "JJ Foundation"). SUF ¶ 69. JJ also served actively on the board of the JJ Foundation and made many *inter vivos* gifts to his new foundation throughout the remainder of his life. SUF ¶¶ 70-75.

In 1999 and again in 2005, JJ executed superseding wills (the "Second Will" and the "Third Will," respectively) with the assistance of Davis and the Firm. SUF ¶¶ 76-81. The terms of the Second Will and the Third Will were materially identical to one another: JJ made specific bequests to certain nieces and nephews, and then identified the JJ Foundation as the residuary beneficiary of the estate. SUF ¶¶ 77, 81. In all three wills, JJ named Davis as executor of his estate. SUF ¶¶ 66, 78, 81. In none of the three wills did JJ leave one cent's worth of assets to Catherine or the Peterson Family Foundation. SUF ¶¶ 67, 79, 81.

In 2013, JJ passed away. Shortly after, Davis petitioned the Puerto Rico Probate Court to be appointed executor of JJ's estate. SUF ¶ 82. Davis's petition faced no opposition whatsoever—let alone from either Plaintiff—and the Probate Court thus appointed Davis to distribute JJ's estate. SUF ¶¶ 83-84. Davis distributed JJ's assets according to JJ's wishes, as formalized in the Third Will. SUF ¶ 85. Some personal belongings were given to JJ's nieces and nephews (Catherine's children). SUF ¶ 86. JJ's remaining $70 million in property rolled into the JJ Foundation. SUF ¶¶ 87-90. Until this Action, no person challenged Davis's distribution of JJ's estate.

B. Procedural History

In 2017, Plaintiffs commenced this Action. *See* ECF No. 1 (Complaint). As this Court is well aware, Plaintiffs aver in their 99-page Complaint that Davis and his law partners unduly influenced JJ in JJ's old age to disinherit Plaintiffs in favor of a new charitable organization

controlled by Davis and the Firm, all in violation of RICO. *Id.* Plaintiffs claimed $75 million in damages before trebling. *Id.* This Court denied Defendants' motion to dismiss. ECF No. 33.

In April 2022, on Defendants' motion, this Court compelled Plaintiffs to supplement their Rule 26 Initial Disclosures to include a detailed computation of damages to account for the $75 million in claimed damages. ECF No. 552. In May 2022, Plaintiffs served their Third Amended Initial Disclosures. *See* Ex. 1 to Decl. of David Chardack ("Ex. 1"). Those disclosures made clear that $70 million of Plaintiffs' $75 million in alleged pre-trebling damages flow from (1) cash in JJ's bank accounts at the time of his death ($500,000), (2) DFC stock that JJ held at the time of his death (worth $67 million), and (3) JJ's San Juan apartment where JJ lived at the time of his death (worth $2.5 million). *Id.* at 2-3. These assets were listed in Davis's accounting of JJ's estate and granted to the JJ Foundation pursuant to JJ's Third Will. SUF ¶ 89.

Plaintiffs Catherine Peterson and the Peterson Family Foundation describe in their Third Amended Initial Disclosures that *Plaintiffs* would have inherited all these assets absent the alleged undue influence Defendants exerted on JJ.[1] Ex. 1 at 2-3; *see also* Complaint. Defendants now bring this Motion for Partial Summary Judgment on the issue of RICO damages.[2]

LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense—*or the part of each claim or defense*—on which summary judgment is sought." Fed. R. Civ. P. 56(a) (emphasis added). The Court may further "enter an order stating any material fact [] *including an*

[1] Defendants deny all allegations related to this scheme of undue influence. *See* ECF No. 42 (Defendants' Answer). However, Defendants acknowledge that this disagreement amounts to a disputed issue of material fact and therefore do not move for summary judgment on the issue of liability. Defendants look forward to disproving Plaintiffs' outlandish claims at trial.

[2] Defendants do not now challenge Plaintiffs computation of the remaining alleged damages, which stem from an alleged fee dispute.

item of damages … that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g) (emphasis added).

Where no genuine dispute exists about an item of damages, federal courts regularly narrow the damages that a plaintiff may attempt to prove at trial, pursuant to Rule 56(g). *See, e.g.*, *Ortiz-Lebron v. United States*, 945 F. Supp. 2d 261, 268 (D.P.R. 2013); *Mack v. WP Co., LLC*, 923 F. Supp. 2d 294, 301 (D.D.C. 2013) ("Under Rule 56(g) of the Federal Rules of Civil Procedure, even where summary judgment cannot be granted on liability because there are genuine issues of material fact to be tried, the Court is empowered to 'indicate the extent to which the amount of damages or other relief is not in controversy.'"); *Reynolds v. S & D Foods, Inc.*, 822 F. Supp. 705, 706-707 (D. Kan. 1993) (granting partial summary judgment pursuant to Rule 56(g)'s predecessor and noting that "[w]hen ruling on a partial summary judgment motion, the district court may indicate the extent to which the amount of damages is not in controversy"); *United States v. West Virginia*, 537 F. Supp. 388, 399 (S. D. W.Va. 1982) (same); *Blackford v. Action Prods. Co., Inc.*, 92 F.R.D. 79, 80 (W.D. Mo. 1981) (same); *cf. State Farm Fire & Cas. Co. v. Habibzai,* No. 2:16-CV-67-GZS, 2017 WL 3613026, at *1 (D. Me. Aug. 22, 2017) (granting partial summary judgment pursuant to Fed. R. Civ. P. 56(g) on discrete fact questions, and noting that "[u]ltimately, summary judgment does not require 'an all-or-nothing approach,' and the Court may grant partial summary judgment on only certain claims or even part of a claim").

The text and purpose of Rule 56 mandate this approach, namely to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56, advisory committee's note to 1964 amendments; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327 (1986) (purpose of summary judgment to "isolate and dispose of factually

unsupported" contentions before trial and to "secure the just, speedy, and inexpensive determination of every action" (quoting Fed. R. Civ. P. 1)).

Limiting damages pursuant to Rule 56 has precedent in this Court under similar circumstances to those here. In *Ortiz-Lebron v. United States*, for instance, this Court granted the defendant's motion for partial summary judgment pursuant to Rules 56(a) and (g) when a wrongful-death plaintiff advanced an impermissible measure of damages. 945 F. Supp. 2d 261, 263, 268 (D.P.R. 2013). The plaintiff—decedent's mother—had claimed as damages the *entirety* of decedent's expected future income, even though the parties agreed that decedent had supported his mother with just $300 per month during his lifetime. *Id.* at 263. Applicable law limited the plaintiff's recovery to the amount of support that plaintiff actually received from the deceased, so summary judgment was appropriate to "prescribe[] the boundary limits of what [the plaintiff] may recover" at trial. *Id.* at 268. The Court faces the same circumstance here, where some triable issues may remain, but where the parties do not dispute that they seek to recover $70 million that belonged to a third party and is not recoverable under applicable law.

As with any Rule 56 motion, summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Sands v. Ridefilm Corp.,* 212 F.3d 657, 660 (1st Cir. 2000) (citing Fed. R. Civ. P. 56(c)); *see also Celotex*, 477 U.S. at 322. Thus, "[t]he party moving for summary judgment … bears the initial burden of demonstrating that there are no genuine issues of material fact for trial," a burden that "may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Sands*, 212 F.3d at 661 (quoting *Celotex,* 477 U.S. at 323). Though the non-movant may defend the motion

by pointing to "evidence to show that a reasonable jury could find for them," the non-movant is "not permitted to rely on 'conclusory allegations, improbable inferences, and unsupported speculation.'" *Gudseth v. Family Med. Assoc. LLC*, 45 F.4th 526, 533-34 (1st Cir. 2022) (quoting *Theidon v. Harvard Univ.*, 948 F.3d 477, 496 (1st Cir. 2020)).

ARGUMENT

There is no dispute that $70 million of Plaintiffs' claimed damages arises from Plaintiffs' claims to the property that belonged to JJ's estate. Summary judgment is therefore appropriate here for two primary reasons. First, Plaintiffs themselves have confirmed in discovery that they seek to recover money that first belonged to JJ, and then to JJ's estate, to which Plaintiffs have never had a lawful property interest. Because damages are recoverable under RICO only to the extent that they injure a *plaintiff's* business or property, the purported damages to JJ's estate—which itself is a third party not named in this action—are wholly impermissible. The contention that Plaintiffs *expected* to inherit JJ's estate does not save their claim to the $70 million lawfully distributed from that estate; even in the light most favorable to Plaintiffs, they show a purported injury to an expectancy interest, not a property interest that RICO protects.

Second, even if RICO permitted Plaintiffs to unwind the resolution of a third party's estate and redistribute it according to Plaintiffs' own wishes (to be clear, it does not), Plaintiffs cannot do so in this Court. Under the probate exception to federal jurisdiction, this Court has no power to annul a will or to enter any order or judgment that necessitates invalidating a will. Principles of federal court jurisdiction recognize that Plaintiffs' dispute over JJ's estate belongs in commonwealth court, not in a federal District Court. For this independent reason, this Court has no jurisdiction to undo the distribution of JJ's estate and should enter an order limiting damages only to those that Plaintiffs can demonstrate flow from some other cognizable injury.

The Court should accordingly grant this Motion for partial summary judgment and establish that the $70 million in damages sought from JJ's estate are not a lawful RICO injury.

I. RICO DAMAGES CANNOT ARISE FROM JJ'S ESTATE, WHICH IS NOT AND NEVER WAS PLAINTIFFS' BUSINESS OR PROPERTY.

A RICO plaintiff "can only recover to the extent that[] he has been injured in *his* business or property by the conduct constituting the violation." *Pujol v. Shearson/Am. Exp., Inc.*, 829 F.2d 1201, 1205 (1st Cir. 1987) (emphasis added) (quoting *Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479, 495-96 (1985)); *see also* 18 U.S.C. § 1962 ("Any person injured in *his* business or property by reason of a violation of section 1962 of this chapter may sue therefor…." (emphasis added)). Accordingly, RICO does not permit Plaintiffs to recover either for injuries to a third party's property *or* contingent or speculative property interests.

A. RICO Damages Cannot Arise From The Property Of A Third Party.

The wealth that comprised JJ's estate is not, and never was, the business or property of either Plaintiff. As is not disputed by the Plaintiffs, nonparty JJ and Plaintiff Catherine Peterson each inherited half of their parents' wealth according to their parents' wishes. *See, e.g.*, ECF No. 1, ¶¶ 40, 62. The property that JJ received and built over the course of his life was for JJ, and JJ alone, to enjoy and dispose of. *See e.g.*, 31 L.P.R.A. § 1111 ("Ownership is the right by which a thing belongs to some one in particular, *to the exclusion of all other persons*. Ownership confers the right to enjoy and dispose of things without further limitations than those established by law." (emphasis added)); *id.* § 1114 (an asset belongs to the person or entity who has immediate dominion over it and nobody else); *Banco Territorial y Agricola v. Arvelo*, 7 D.P.R. 566, 568 (1904) ("[T]he owner can dispose of the thing owned in any way he may see fit."). Conversely, the wealth that Catherine built over the course of her life was hers and hers alone to enjoy and dispose of. Plaintiffs do not dispute these simple facts.

As was customary of all members of the Peterson family, JJ executed a will to dispose of his assets upon his death.[3] Complaint ¶ 42; *see id.* ¶ 46. Because JJ died with no forced heirs under Puerto Rico law,[4] he was entitled to "dispose by will of all of his assets or part thereof in favor of *any person* qualified to acquire them." 31 L.P.R.A § 2281 (emphasis added). Plaintiffs allege that JJ's will "deviated from the Peterson Family's traditional bequests to family members in wills," ECF No. 1 ¶ 53, but—to risk stating the obvious—family tradition is not, by itself, legally binding. By operation of law, the assets that comprised JJ's $70 million estate were first the property of JJ, then the property of JJ's estate, and finally the property of the beneficiaries of JJ's will. Because neither JJ nor his estate is a plaintiff in this case, and because neither Plaintiff was a beneficiary of JJ's will at the time of JJ's death, at no point did either Plaintiff *own* JJ's wealth.

These basic principles of Puerto Rico property law reveal that Plaintiffs' RICO claims are a non-starter. Plaintiffs simply have *no* property rights to JJ's estate under commonwealth law. And a RICO Plaintiff cannot recover for purported injury to a third party, because a party "can only recover to the extent that[] *he* has been injured in *his* business or property." *Sedima*, 473 U.S. at 495-96; *see also Avalos v. Baca*, 596 F.3d 583 (9th Cir. 2010) (looking to state law to define

[3] Though Plaintiffs aver that Davis "convinced JJ that he needed a will," ECF No. 1 ¶ 47, this allegation is contradicted in the pleadings themselves and unsupported by record evidence. As described in the Complaint, JJ's father Jack Sr. (*id.* ¶ 43), JJ's mother Anna (*id.* ¶ 62), and JJ's sister Plaintiff Catherine (*id.* ¶ 69) each executed wills during their lifetimes. Plaintiffs also reference the "Peterson Family tradition[]" to dispose of property at death by bequest (AC ¶ 53). It is therefore "conclusory allegation[], improbable inference[], and unsupported speculation" that Plaintiffs expected JJ to die intestate. *Guldseth*, 45 F.4th at 533.

[4] The only persons who could be JJ's forced heirs would be JJ's descendants, surviving ascendants, or surviving spouse. 33 L.P.R.A. §§ 2362, 2592. JJ never had a spouse or children, and he died many years after his parents. It is not in genuine dispute that JJ had no forced heirs as defined by Puerto Rico law; he was therefore entitled to devise his assets to "any person qualified to acquire them." 33 L.P.R.A. § 2281.

"property" but finding that state-law definition of property had not been injured); *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992) (same).

Federal courts therefore deny recovery to RICO plaintiffs who assert injury to a third party's property without a proper basis in state property law. *See, e.g.*, *Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd.*, 990 F.3d 31, 37 (1st Cir. 2021) (affirming dismissal of RICO claims where "[third party] Mohegan, not [plaintiff] Sterling, is the directly injured party who can be counted on to vindicate the law"); *Garcia-Monagas v. W. Holding Co.*, No. Civ. 07-1217 ADC, 2009 WL 483146, at *15 (D.P.R. Feb. 25, 2009) (dismissing RICO claims where the contested property belonged to third parties—not plaintiffs—and noting that "the success of each RICO cause of action depends on plaintiffs' ownership of the contested property"); *Lynch v. Amoruso*, 2017 WL 543232, at * 6 (S.D.N.Y. Feb. 8, 2017) (same, explaining that "[plaintiff], however, never asserts that she had any interest in [the contested property]"); *Bowen v. Adidas Am., Inc.*, 541 F. Supp. 3d 670, 678-79 (D.S.C. 2021) (granting summary judgment to defendant where plaintiff's father—not plaintiff—paid legal fees alleged to be RICO injury); *see also Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994) (affirming summary judgment for RICO defendants where fraudulent medical bills alleged to be in violation of RICO were paid out by third-party insurer—not plaintiff insureds, who were reimbursed by the insurer and thus suffered no injury to their own financial position); *Hamm v. Rhone-Polenc Rorer Pharms., Inc.*, 187 F.3d 941, 947 (8th Cir. 1999) (affirming summary judgment for RICO defendants where third parties—not plaintiffs—were induced by fraud to purchase drugs for off-label uses in purported violation of RICO); *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 730 (8th Cir. 2004) (affirming summary judgment for RICO defendant where third-party bankruptcy estate—not plaintiffs—suffered

alleged RICO injury); *Summerfield v. Strategic Lending Corp.*, 2011 WL 845946 (N.D. Cal. Mar. 8, 2011) (dismissing RICO claim where plaintiff's parents—not plaintiff—were the injured party).

For instance, *Garcia-Monagas*, 2009 WL 483146, and *Vasarhelyi*, 2012 WL 3308487, are particularly illustrative where, as here, RICO plaintiffs claimed injury to property that belonged to a relative's estate. In *Garcia-Monagas*, this Court dismissed the plaintiff's claim where the plaintiff averred that a defendant's RICO violations caused the diminution in value of property that "should be" the plaintiff's property. 2009 WL 483146, at *15. However, the property had already been distributed to third parties pursuant to the Puerto Rico Civil Code and never belonged to the plaintiff. *Id.* This was fatal to the plaintiff's claim because "the very definitions of the alleged RICO elements *rely on the assumption that plaintiffs have an ownership interest in the contested property*." *Id.* at *14 (emphasis added). The Court in *Vasarhelyi* applied the same reasoning to grant summary judgment to defendants in a RICO claim where the plaintiff did not "set forth any evidence to suggest that he has a beneficial interest" in the property at issue in the case. 2012 WL 3308487, at *8.

So too here. Though Catherine and the Peterson Family Foundation suggest that they should have had some interest in the $70 million of the "Peterson Family Wealth" that comprised JJ's estate, this assertion runs in contradiction to the record and the law. Ex. 1 at 2; *see Garcia-Monagas*, 2009 WL 483146, at *15 (dismissing allegations grounded in allegations that the property injured "should be" plaintiffs'). This Court must not indulge Plaintiffs' misleading generalization: under the Civil Code of Puerto Rico, the assets of JJ's estate did not belong to the Peterson *family*, but to JJ Peterson himself, and Plaintiffs can point to nothing in the record showing that they ever had a property interest in JJ's wealth. The alleged RICO elements "rely on the assumption that plaintiffs have an ownership interest in the contested property," and absent

that ownership, their claims to the property of JJ's estate must fail. *Garcia-Monagas*, 2009 WL 483146, at *14.

B. Plaintiffs' Claims To JJ's Estate Are Speculative and Contingent.

Plaintiffs' claim of injury to JJ's $70 million estate cannot be saved by their repeated contentions that Catherine *would* have inherited from JJ's estate had JJ died intestate. Given the "restrictive significance" of the "business or property" requirement, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), it is a well-established feature of RICO that injuries to speculative or contingent interests in property cannot form the basis of a RICO plaintiff's damages. *See, e.g.*, *Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd.*, 990 F.3d 31, 35 (1st Cir. 2021) (affirming dismissal of RICO action where injury to plaintiff's rental income was "purely contingent" on obtaining state licenses); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990) (affirming dismissal of RICO action where "the only injury alleged is contingent upon [plaintiff's] prevailing in its pending state court action" and noting that "damages, at this point, [are] purely speculative, and not ripe for resolution"). In this case, the injuries to Plaintiffs arising from JJ's estate are both speculative and contingent and therefore are not cognizable as a matter of law.

As an initial matter, Plaintiffs' claimed interest in JJ's $70 million estate is, at best, a contingent property interest. A contingent property interest depends "on events that may not occur as anticipated or may not occur at all," and an injury to a contingent property interest is not recoverable under RICO. *Lincoln House*, 903 F.3d at 847 (collecting cases); *see also Vitone v. Metropolitan Life Ins. Co.*, 954 F. Supp. 37 (D.R.I. 1997) (dismissing RICO action where plaintiff claimed injury arising out of declining a job opportunity and instead accepting employment that was eventually terminated by defendants; injury was contingent upon plaintiff accepting and performing satisfactorily at the job he declined); *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995) (affirming summary judgment for defendants on RICO claim where plaintiffs'

alleged loss of an opportunity to receive a loan on favorable terms, which was contingent on loan officer's approval, and injury entailed "speculative damages … not compensable under RICO"); *Taylor v. Bettis*, 976 F. Supp. 2d 721, 737 (E.D.N.C. 2013) (dismissing RICO claim and noting that "[t]his possibility of a judgment in Plaintiffs' favor, and the possibility of a right to recover therefrom, is not a cognizable injury under RICO. It is, rather, a 'mere expectancy'"); *Bowen v. Adidas Am., Inc.*, 541 F. Supp. 3d 670 (D.S.C. 2021) (granting summary judgment on RICO claim for defendant because plaintiffs' claimed injury to future "lost professional earnings" was "an unrecoverable expectancy interest"); *Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc.,* 87 F. App'x. 227, 233 (3d Cir.2003) (affirming dismissal of RICO claim because union's lost income was contingent on general contractor awarding labor subcontracts to union workers); *Tel-Instrument Elec. Corp. v. Teledyne Indus., Inc.*, 934 F.2d 320, 1991 WL 87194, *2 (4th Cir. 1991) (table opinion) (affirming directed verdict for defendants on RICO claim because plaintiff's lost income from losing a government contract was contingent on the plaintiff submitting the strongest bid and the government awarding the contract to plaintiff, or to anyone at all). This is because RICO's business-or-property requirement precludes compensating a plaintiff for an "expectation interest that would not have existed but for the alleged RICO violation." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228-29 (2d Cir. 2008) (quoting *Heinhold v. Perlstein*, 651 F. Supp. 1410, 412 (E.D.Pa. 1987)).

Catherine was not a forced heir of JJ's and (absent a bequest in JJ's will) she could inherit JJ's estate only if JJ had died intestate, in which circumstances she would be the closest surviving heir. Still, Catherine argues, she would have inherited the $70 million of JJ's estate had Defendants not "unduly influenced" JJ to disinherit Catherine. This is not true.

Catherine's putative inheritance would depend on the contingent events that, even assuming Defendants had played no role in JJ's estate planning at all, (1) JJ would *never* execute a will or would execute a will naming Catherine as a beneficiary, and (2) that, even if JJ had once named Catherine in one of his wills, JJ would *never* change his mind about his estate planning at any time before his death, which the law entitled him to do for any reason or for no reason at all. *See, e.g.*, 31 L.P.R.A. § 1084 (persons have the right to dispose freely of their property without any restrictions other than those imposed by law); *id.* § 2281 (persons may "dispose by will of all of [their] assets or part thereof in favor of any person qualified to acquire them"). Neither Plaintiffs nor this Court can be sure that these contingencies would have occurred as Catherine desired.

Next, Plaintiffs' claim to every last dollar of JJ's $70 million estate is purely speculative, and "speculative damages are not recoverable under RICO." *Sanchez v. Triple-S Mgmt. Corp.*, 2005 WL 8168578, at *10 (D.P.R. Mar. 7, 2005) (collecting cases); *see also Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988) (affirming partial dismissal of RICO action where "damages … are unrecoverable … because their accrual is speculative and their amount and nature unprovable" (quotation marks and citations omitted)); *Bowen v. Adidas Am., Inc.*, 541 F. Supp. 3d 670 (D.S.C. 2021) (granting summary judgment on RICO claim for defendant because plaintiffs' claimed injury to future "lost professional earnings" in the NBA were "an unrecoverable expectancy interest" because the amount of damages is entirely unascertainable); *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 24 (2d Cir. 1990) ("[I]njury in the form of lost business commissions ... is too speculative to confer standing, because Hecht only alleges that he would have lost commissions in the future, and not that he has lost any yet.").

Even accepting as true that, absent Defendants' allegedly unlawful acts, JJ would have named Catherine a beneficiary in his will, Plaintiffs can only speculate that JJ would have left

100% of his estate to Catherine. Plaintiffs proffer *no facts* showing that JJ would have done so, except for a passing reference in the Complaint to the Peterson family tradition of leaving property to relatives. ECF No. 1 ¶ 49. Even so, Plaintiffs conclude without evidence that JJ would not have chosen to leave property to other members of the Peterson family (and, in fact, JJ did make small bequests to Catherine's children—just not Catherine herself). Plaintiffs similarly conclude without evidence that JJ would not have left any of his property to friends, employees, charities, or anyone else. Further, even if JJ had made Catherine the residuary beneficiary of his estate, the residue of JJ's estate could have been enlarged or diminished in commonwealth probate proceedings, thus making it impossible to ascertain the damages that would correctly compensate Plaintiffs.

No surprise, RICO claims arising from injury to a decedent's estate are typically either contingent or speculative and are typically resolved as a matter of law in favor of defendants. State law, which informs the definition of "property" under RICO, respects a testator's right to change his mind until the moment of death about how to dispose of his assets. Indeed, state law treats inheritance expectancies and bequests as contingent and speculative until the decedent dies. *See Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) (affirming dismissal of RICO claim because plaintiffs' injuries arising from decedent's estate were contingent on estate being distributed in plaintiffs' favor); *Sheshtawy v. Conservative Club of Houston, Inc.*, 697 F. App'x 380, 382 (5th Cir. 2017) (same); *D'Addario v. D'Addario*, 901 F.3d 80, 94 (2d Cir. 2018) (same; vacating dismissal in part on other grounds); *see also Summerfield v. Strategic Lending Co.*, 2010 WL 3743897, *5 (N.D. Cal. Sept. 20, 2010) (same outcome where plaintiff claimed injury to his parents' wealth and the revocable trust held for plaintiff's benefit; plaintiff's interest was contingent on parents funding the revocable trust and never revoking it before death); *Vasarhelyi v. Vasarhelyi*, No. 09 C 02440, 2012 WL 3308487, at *8 (N.D. Ill. Aug. 13, 2012) (granting

summary judgment to RICO defendants because "a person who claims a beneficial interest based on the notion that he *might* stand to inherit property in the future" has no cognizable RICO injury to business or property).

Plaintiffs' claim here is even weaker than those that were dismissed in *Firestone, Sheshtawy,* and *D'Addario*. In those cases, plaintiffs were *named beneficiaries* in their ancestors' wills, and in each case the plaintiffs' claimed injury was insufficient as a matter of law because it was contingent on the outcome of probate proceedings in state court. *Firestone*, 976 F.2d at 285; *Sheshtawy*, 697 F. App'x at 382; *D'Addario*, 901 F.3d at 94. As the *D'Addario* court reasoned, state probate proceedings may enlarge or diminish the size of a probate estate, determine the priority of bequests, and even invalidate certain bequests, all of which are contingent events that would affect the proper amount of compensatory damages recoverable under RICO. *D'Addario*, 901 F.3d at 94-95. Plaintiffs' injuries here are contingent and speculative for the same reasons. And, importantly, Plaintiffs' claims here are weaker than the plaintiffs' in *Firestone, Sheshtawy,* and *D'Addario* because neither plaintiff here was a *named beneficiary* of the estate that held the disputed property.

In short, none of Plaintiffs' allegations concerning JJ's $70 million estate show how *Plaintiffs* were injured by the Defendants' purported RICO violations. Even assuming as true all of Plaintiffs' allegations concerning Defendants' treatment of JJ's estate (which, at this stage, the Court is not bound to do), Plaintiffs allege only an injury to JJ or to the estate itself—third parties in this action. Any cognizable claim to JJ's estate requires this Court to assume as inevitable many contingent events and to indulge Plaintiffs' self-serving speculation about what JJ's wishes *would have been* absent Defendants' advice to JJ. Damages arising out of Plaintiffs' claims to JJ's estate cannot be recoverable as a matter of law.

II. THE PROBATE EXCEPTION DEPRIVES THIS COURT OF JURISDICTION TO REVALUE JJ'S ESTATE OR INVALIDATE JJ'S WILL.

This Court has no jurisdiction to annul JJ's will, and it is beyond the jurisdiction of this Court to grant any remedy that sets aside JJ's wishes in favor of Catherine's wishes, including damages that reallocate JJ's estate between claimants to that estate. The long-recognized probate exception to federal jurisdiction "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006); *Sutton v. English*, 246 U.S. 199, 208 (1908) (suit to annul a will found "supplemental to the proceedings for probate of the will" and therefore not permitted in federal court); *Hunt v. Hunt*, 512 F. Supp. 3d 39, 71 (D. Me. 2020) ("The probate exception bars federal courts from annulling wills."); *Tartak v. Del Palacio*, 2010 WL 396052 (D.P.R. Sept. 30, 2010) ("Suits to annul a will are barred.").

In this case, Plaintiffs seek damages arising from the probate and distribution of JJ's estate. Though Plaintiffs dress up their probate claims as civil RICO claims, the form of their pleadings should not distract this Court from the nature of this action to disturb JJ's testamentary wishes. As this Court has recognized, the task before it is to "analyze each count [in the Complaint], and inquire whether it requires the probate or annulment of a will or the administration of a decedent's estate." *Lebron Yero v. Lebron-Rodriguez,* 2020 WL 1493897 (D.P.R. Mar. 24, 2020); *see also Glassie v. Doucette*, 559 F. Supp. 3d 52, 57 (D.R.I. 2021) (dismissing probate dispute couched as RICO claim and noting that "[t]he task for a court confronted with a claim of a probate exception is to press past the labels and determine whether the asserted federal action is merely intertwined with state probate proceedings or, in practical respect, would entail … administration of the estate.").

The relief that Plaintiffs ask from this Court demonstrates Plaintiffs' transparent attempt to undo the administration of JJ's estate and to set aside JJ's will. Indeed, Plaintiffs' own calculation of damages indicates that they reach the $70 million figure of damages by looking to the accounting of JJ's duly administered estate. *See* Ex. 1 at 2-3. A judgment from this Court granting plaintiffs damages arising from the administration of JJ's estate would imply a finding from this Court that JJ's will was invalid. This is the precise relief that the probate exception prohibits. "Although increasing an estate through assets not currently in it does not fall within the probate exception, reallocating the estate's assets among contending claimants does." *Lebron Yero*, 2020 WL 1493897, at *4; *cf. also Jiminez v. Rodriguez-Pagan*, 597 F.3d 18, 24 (1st Cir. 2010) ("enlargement of the decedent's estate through assets not currently within it" is within the jurisdiction of federal courts, but "divvying up an estate" is not).

Independent of the deficiencies with Plaintiffs' claimed injuries under federal RICO law, Plaintiffs cannot ask this court to set aside JJ's will to manufacture a cognizable inheritance expectancy. Plaintiffs missed their opportunity to challenge the distribution of JJ's estate when they failed to assert their complaints in Puerto Rico probate court immediately following JJ's death. For this independent reason, partial summary judgment is appropriate to preclude a finding in this Court that JJ's will is null.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant partial summary judgment in favor of Defendants with respect to the $70 million in damages arising from injury to JJ and his estate.

DATED: New York, NY
October 1, 2022

Respectfully submitted,

/s/ David Chardack
David Chardack
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Fl.
New York, NY 10010

Applicant Details

First Name	**Julio**
Last Name	**Colby**
Citizenship Status	**U. S. Citizen**
Email Address	**jcolby@jd24.law.harvard.edu**
Address	**Address** Street **3 Linnaean St** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**2813890659**
Other Phone Number	**2813890659**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**May 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Block, Sharon
sblock@law.harvard.edu
617-495-9265
Lopez, David
david.lopez@law.rutgers.edu
8623018898
Sachs, Benjamin
bsachs@law.harvard.edu
617-384-5984

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JULIO QUIROZ COLBY
3 Linnaean St. #2 • Cambridge, MA 02138 • (281) 389-0659 • jcolby@jd24.law.harvard.edu

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to apply for a clerkship in your chambers for the 2024 term. I am currently a rising third-year law student at Harvard Law School and the Developments in the Law Chair of the *Harvard Law Review*.

Attached please find my resume, law school transcript, undergraduate transcript, writing sample, and recommendation letters from the following professors:

- Professor Benjamin I. Sachs, bsachs@law.harvard.edu, (617) 384-5984
- Professor Sharon K. Block, sblock@law.harvard.edu, (202) 302-1801
- Professor P. David Lopez, pdlopez@law.harvard.edu, (973) 353-5551

The writing sample is a Comment that appeared in the April 2023 issue of the *Harvard Law Review* and concerns federal preemption of California's Fast Food Accountability and Standards Recovery Act (FAST Act). As an aspiring public interest lawyer, I am particularly interested in clerking on the Second Circuit to understand how novel state and local policies like the FAST Act can impact working people and to learn how federal courts address conflicts between state and federal law.

If there is any other information that would be helpful to you, I would be happy to provide it. Thank you for your time and consideration.

Sincerely,

Julio Colby

Enclosures

JULIO QUIROZ COLBY

3 Linnaean St. #2 • Cambridge, MA 02138 • (281) 389-0659 • jcolby@jd24.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, MA
Candidate for J.D., May 2024
Honors: *Harvard Law Review*, Developments in the Law Chair
Activities: Professor Kristin Stilt, Teaching Assistant (Property Law)
La Alianza, Public Interest Chair
Law and Social Change Program of Study, Student Fellow
OnLabor, Student Contributor

The University of Texas at Austin, Austin, TX
B.A. with Honors in International Relations and Global Studies, May 2019
Honors: Posse Foundation Full Tuition Leadership Scholarship
Activities: Semester abroad and independent research project at Tecnológico de Monterrey Ciudad de México, Mexico

PUBLICATIONS

Recent Legislation, *CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)*, 136 HARV. L. REV. 1748 April 2023

EXPERIENCE

Office of Senator Elizabeth Warren, Washington, D.C. Summer 2023
Legal Fellow
Preparing decision memoranda for Senator recommending she cosponsor bills, sign on to letters, and support or oppose legislation and nominees; composing oversight letters sent from Senator's desk to government agencies and private parties; designing legislative and oversight strategy to address prison health conditions; and building out policy toolkit for market consolidation in agricultural industry.

Center for Labor and a Just Economy, Cambridge, MA Spring 2023–Present
Research Assistant to Professors Sharon Block and Benjamin I. Sachs
Preparing memorandum outlining federal constitutional limits to state legislation absent federal labor law preemption.

Harvard Immigration and Refugee Clinic, Cambridge, MA Spring 2023
Clinical Student
Working directly with clients in a variety of immigration proceedings, including preparing minors for asylum add-on petition interview, drafting affidavit of supporting witness to include in supplemental filing, and preparing client for direct- and cross-examination questions for asylum hearing in immigration court.

Southern Migrant Legal Services, Nashville, TN Summer 2022
Legal Intern
Assisted in all stages of pre-trial litigation at farmworker employment law legal aid including direct Spanish-language outreach to migrant farmworkers across Southeastern US; completing new client intakes; meeting with potential clients and completing internal case evaluation memoranda; assembling discovery responses; deposition note-taking and analysis for summary judgment motion; building proof chart; preparing for settlement conference; and submitting subpoenas and FOIA requests. Completed research memoranda on NLRA retaliation protections and post-dissolution corporate liability for ongoing litigation.

Harvard Law School, Cambridge, MA Summer 2022
Research Assistant to Visiting Professor P. David Lopez
Analyzed provisions, mechanisms, and commitments in the United States-Mexico-Canada Agreement for research memorandum identifying new protections for labor organizing and employment discrimination in Mexico and the United States.

Harvard Advocates for Human Rights, Cambridge, MA Fall 2021
Sovereign Immunity Project Team Member
Conducted independent legal research and drafted comparative law memorandum on countries' compliance with International Court of Justice decisions to be used by a human rights NGO seeking to enforce a judgment against a sovereign nation.

CS DISCO, Inc., Austin, TX Summer 2019–Summer 2021
Revenue Operations Analyst II
Led software implementation for eDiscovery professional services department supporting four teams with differing needs and nearly 100 users. Recruited to ten-person taskforce led by CEO to critically deconstruct, analyze, and build desired state of business processes, metrics, and systems.

Refugee and Immigrant Center for Education and Legal Services (RAICES), Austin, TX Fall 2018
Legal Intern
Translated and transcribed clients' verbal declarations and written legal documents to be used in asylum proceedings. Compiled and maintained client files for immigration attorney. Created presentation to explain U.S. immigration system processes to clients.

PERSONAL

Native speaker of English and Spanish, limited French and Portuguese
Passionate guitarist, follower of international politics and Eastern philosophy, avid jazz and indie music fan

Harvard Law School

Date of Issue: June 2, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Julio Q Colby
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 5 Sachs, Stephen	H	4
1001	Contracts 5 Bar-Gill, Oren	H	4
1002	Criminal Law 5 Natapoff, Alexandra	H	4
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
1005	Torts 5 Goldberg, John	P	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1054	Advocacy: The Courtroom and Beyond Gershengorn, Ara	CR	2
	Winter 2022 Total Credits:		2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 5 Gersen, Jeannie Suk	P	4
3107	Critical Corporate Theory Lab Hanson, Jon	H	2
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
1003	Legislation and Regulation 5 Rakoff, Todd	P	4
1004	Property 5 Mack, Kenneth	H	4
	Spring 2022 Total Credits:		16
	Total 2021-2022 Credits:		36

Fall 2022 Term: September 01 - December 31

3176	A Democracy Initiative Lessig, Lawrence	H	2
2000	Administrative Law Freeman, Jody	P	4
8052	Animal Law & Policy Clinic Meyer, Katherine	WD	0
2142	Labor Law Sachs, Benjamin	H	4
2067	Organizing for Economic Justice in the New Economy Block, Sharon * Dean's Scholar Prize	H*	2
	Fall 2022 Total Credits:		12

Winter 2023 Term: January 01 - January 31

2330	International Labor Migration Rosenbaum, Jennifer	H	2
	Winter 2023 Total Credits:		2

Spring 2023 Term: February 01 - May 31

8020	Harvard Immigration and Refugee Clinic Ardalan, Sabrineh	H	3
2115	Immigration and Refugee Advocacy Ardalan, Sabrineh	H	2
3139	Law and the Legal System through the Lens of Latinx/a/o Communities Lopez, P.	H	2
2212	Public International Law Blum, Gabriella	H	4
	Spring 2023 Total Credits:		11
	Total 2022-2023 Credits:		25

Fall 2023 Term: August 30 - December 15

2897	Contemporary Issues in Constitutional Law Liu, Goodwin	~	2
2069	Employment Law Sachs, Benjamin	~	4
2079	Evidence Rubin, Peter	~	2
2169	Legal Profession Gordon-Reed, Annette	~	3
	Fall 2023 Total Credits:		11

Spring 2024 Term: January 22 - May 10

2050	Criminal Procedure: Investigations Natapoff, Alexandra	~	4
8043	Crimmigration Clinic Torrey, Philip	~	3
	Spring 2024 Total Credits:		7

continued on next page

Harvard Law School

Record of: Julio Q Colby

Date of Issue: June 2, 2023
Not valid unless signed and sealed

Total 2023-2024 Credits:	18
Total JD Program Credits:	79

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 05, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to recommend Julio Colby to be your clerk. I am excited to share with you my support for Julio's application for a clerkship with you. I have had the opportunity to observe Julio's work in a number of settings and have come to admire his dedication to studying the law for the purpose of advancing workers' rights and pursuing social change. Even a quick skim of Julio's transcript reveals the depth of his commitment to these issues and to taking advantage of all the opportunities that Harvard Law School provides to advance them.

I was fortunate to have Julio as a student in a seminar I teach on ways that workers are organizing outside of the traditional labor movement. The class required extensive reading and synthesizing different kinds of accounts of worker power building. In every class we would analyze the theory of change represented by the activity of the workers at the center of that class's study, the legal support or challenge for the activity and the practical impact of the activity. I was impressed by Julio's ability to switch back and forth between analysis of theory and practice. Some of his classmates were clearly more comfortable in one realm or the other. Julio was able to make valuable contributions throughout.

Most importantly, I appreciate Julio's rare ability to be an active and valuable contributor to the discussion but not to dominate it. It is always a challenge in a classroom to maintain a balance among participants and to keep the conversation moving. I think the ability to know when to step up and step back is a particularly important skill for a social justice lawyer. I believe it would be a skill that you would value in chambers.

Julio submitted an excellent paper and final project for the seminar. Based on the combination of his thoughtful contributions to class discussions and the superior quality of his paper and final project, Julio earned a Dean's Scholar Prize in my class – the highest grade a classroom professor can grant at HLS.

During this past year, I also had the opportunity to work with Julio on a piece he wrote for the Harvard Law Review. Julio wrote an essay on the Fast Food Accountability and Standards Recovery Act, which was enacted in California last year. Julio's "Recent Legislation" essay focused on the likelihood that the FAST Act would withstand challenge on the basis that it is preempted by federal labor law. He did an excellent job of explaining this novel legislation, articulating the different strains of federal labor law preemption and then predicting how courts would apply the one to the other. Because the FAST Act is a new model of legislation, Julio's piece required him to project and extrapolate from doctrine that was developed in different circumstances. I found Julio very open to discussing his early drafts of the essay. He did a very good job of incorporating suggestions and sharpening his analysis. This experience again suggests that he would be good collaborator for you in chambers.

Finally, Julio has undertaken a research project for me, examining how federal Constitutional rights would apply to labor organizing in the absence of protection for such rights under federal labor law. This research project took a fair degree of creativity as, by definition, the predicate conditions that I asked Julio to address do not actually exist. I was very impressed that Julio and his research partner on this project came up with eight different Constitutional provisions that could be implicated if federal labor law preemption was lifted and states took action to limit collective bargaining rights. This research is very useful for me in my own work probing this question.

I have also had the chance to talk with Julio about his fellowship with Senator Warren this summer. I had the privilege of working in the Senate for Senator Kennedy and so have some insight into the kind of skills necessary to succeed as a Senate staffer. I have every confidence that Julio will make a great contribution to Senator Warren's office. I'm looking forward to hearing about his adventures when he returns to Cambridge in the fall.

My observation about Julio that may be most relevant for you is what a joy it is to work with him. He is a thoroughly decent and compassionate person. I very much looked forward to our conversations about the law, current events and how to make HLS an even better place to be. He would be a very positive presence in your chambers, not only because of his legal acumen but also because of the quality of his character.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Sharon Block

Sharon Block - sblock@law.harvard.edu - 617-495-9265

RUTGERS Law School

Rutgers University-Newark
S.I. Newhouse Center for Law and Justice
123 Washington Street, Room 193A
Newark, New Jersey 07102-3026

http://law.rutgers.edu

DAVID LOPEZ
Professor of Law and Professor Alfred Slocum Scholar

Tel: 973-353-0643
david.lopez@law.rutgers.edu

May 24, 2023,

Dear Honorable Judge,

I am writing to strongly recommend Julio Colby for a clerkship in your chambers.

I am a University Professor at Rutgers Law School-Newark campus, where I served as the Dean on that campus from 2018-2021. I have taught at several law schools, including – as I will discuss – Harvard, as well as NYU and Georgetown. In total I have taught hundreds of law students. Prior to entering academia, I served as the General Counsel of the Equal Employment Opportunity, twice appointed by President Barack Obama and confirmed by the U.S. Senate, where I also supervised and mentored dozens of law students. For the reasons I will discuss below, I regard Mr. Colby as one of the top one-percent of the students I have taught, mentored, and/or supervised during my career.

Following my service as Dean in July 2021, I spent the spring semester of my one-year sabbatical at Harvard Law School where I served as a Visiting Professor. It is in this capacity where I had the pleasure of first meeting Mr. Colby when he served as one of my research assistants examining the labor safeguards of the recently-adopted United States Mexico Canada Free Trade Agreement.

Given his outstanding work, I was pleased to have Mr. Colby enrolled this semester as a student in a seminar entitled "Law and the Legal System through the Lens of Latinx/a/o Communities," where he received a "high pass," the highest grade available. As part of the seminar, Mr. Colby wrote an outstanding paper critically analyzing and deconstructing the federal H-2A worker program and making strong recommendations for reform. One original and powerful quality of the paper is how Mr. Colby interspersed the doctrinal analysis with narratives of interviews he conducted with predominately Mexican national agricultural workers as part of an earlier summer internship.

In addition, as part of a seminar centered on class engagement, Mr. Colby participated frequently in the class always offering insightful comments and written reflections. During these discussions, I was always impressed by the high esteem he was afforded by his peers. Further, Mr. Colby engaged well with the inter-disciplinary materials and approach of the seminar but, more than his peers, always drilled down on some of the thorny doctrinal questions embedded in the broader discussion, analyzing legal materials from many

perspectives as both a deep and creative thinker. Given this clear love of the law and justice, I was not surprised to learn Mr. Colby also serves as an editor of the Harvard Law Review.

One other personal note. Mr. Colby devoted last summer to working on immigrant worker issues with Southern Migrant Legal Services in Nashville, and this summer will be working on labor issues with Senator Elizabeth Warren. As someone who also attended Harvard from a state university, I appreciate the enormous resilience and commitment Mr. Colby has demonstrated to navigate a new and elite space, achieve academic excellence, and remain both humble and focused on providing voice and representation for those too often denied adequate legal services and justice. Needless to say, I am very eager to see what remarkable things he will accomplish in his legal career.

In sum, based on these tremendous characteristics, I have no doubt that Mr. Colby will be a productive, collegial, and valued member of your chambers, and continue to make meaningful and positive contributions to the legal profession, as well as further broader values of access to justice. I am also certain, Mr. Colby will "pay forward" any clerkship opportunity by opening doors to others.

Please reach out if you have any questions. You may contact me at (862) 301-8898.

Sincerely,

David Lopez

May 31, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write on behalf of Julio Colby, a rising third-year student at Harvard Law School, who has applied for a clerkship in your chambers. I recommend Mr. Colby highly. He has been a student in two of my courses, and he is a contributor to the blog I edit. In each of these settings, Mr. Colby has performed extremely well. He also has an impressive commitment to using law in the service of the public. I have no doubt that Mr. Colby will make an outstanding law clerk.

I first met Mr. Colby when he was a student in my 1L reading group, The Struggle for Workers' Rights on Film. This course is a relatively informal small-group class taught in the early months of a student's time at the law school. My course uses a series of movies to explore basic themes in labor movement history and labor law. Mr. Colby stood out in the course for his ability to offer insightful comments about the themes of the movies we were discussing while also bringing to bear his personal and political commitments in a productive way. Mr. Colby's manner of intervention was also notable: he speaks respectfully, thoughtfully, while also making strong arguments that routinely persuaded his classmates.

During the Spring 2022 semester, Mr. Colby was a student in my Labor Law class. Labor Law is a large, black-letter law class taught in the Socratic style. When Mr. Colby took Labor Law there were approximately 90 students in the class, and Mr. Colby was among the strongest. His exam was excellent, earning him an H grade for the course. On each of the exams' three questions, Mr. Colby displayed a strong command of the doctrinal material in the course as well as the more theoretical material. Mr. Colby also was an important contributor to class discussions throughout the semester. He was completely prepared for every class session and answered all the questions I put to him with depth and accuracy. I remember in particular his answers to my questions about American National Insurance Company, a case regarding management functions clauses.

Based on Mr. Colby's performance in my courses, I have asked him to work as a student contributor for OnLabor.org, a labor law blog that I edit. As a contributor, Mr. Colby writes the News & Commentary feature approximately once every two weeks, a task that involves consolidating large amounts of material into short pieces of writing that are clear, accurate and accessible. Doing this work successfully requires both clarity of thinking and strong writing skills –both which Mr. Colby possesses. Mr. Colby's posts are uniformly accurate and extremely well written. He is an exemplary contributor to the blog.

I also have had the privilege of supervising Mr. Colby's "Recent Thing" for the Harvard Law Review, which he wrote on California's new sectoral labor law, the FAST Act. The questions raised by the FAST Act, including whether and why the legislation is preempted by federal labor law, are both complicated and of the utmost importance. Mr. Colby's piece represents one of the first sustained legal treatments of these questions, and it is a model of clarity and persuasive argument.

Finally, I have had the opportunity to get to know Mr. Colby through his service as a student fellow for the Law and Social Change Program of Study (of which I am faculty director). In this capacity, Mr. Colby has taken responsibility for organizing a number of student events designed to encourage interested participants to pursue careers in social change work. He is terrifically well-organized, hard-working and an excellent leader among his peers. Mr. Colby is a pleasure to know and work with. He combines all of this intellectual talent with a humility that can be all too rare among law students. This combination of traits will make Mr. Colby a successful lawyer and a marvelous colleague. I have no doubt that they will also make him a terrific law clerk and a welcome addition to any chambers.

Thank you for your attention to Mr. Colby's application. I would be happy to discuss it further.

Sincerely,

Benjamin Sachs

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WRITING SAMPLE

Drafted Fall 2022–Spring 2023

The attached is the print version of my Comment published in the April 2023 issue of the *Harvard Law Review* arguing that the Fast Food Accountability and Standards Recovery Act, a California law that creates a council to set minimum employment standards for the fast-food industry, is not preempted by the National Labor Relations Act and should serve as a model for local labor legislation.

RECENT LEGISLATION

LABOR LAW — NLRA PREEMPTION — CALIFORNIA LAW CREATES COUNCIL TO SET MINIMUM WORK STANDARDS FOR FAST-FOOD INDUSTRY. — CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023) (effective Jan. 1, 2023).

In 2012, two hundred fast-food workers in New York City walked out of their jobs demanding $15 an hour and a union.[1] Since then, the "Fight for $15" campaign has spread to become a global movement demanding (and winning) wage increases for low-income workers in cities across the country.[2] Faced with a "weak" and "rigid" federal labor statute[3] in the National Labor Relations Act[4] (NLRA) and the challenges of organizing a transient workforce[5] in a "fissured" workplace,[6] the movement has turned to state employment law to protect workers.[7] Recently, in California, the Fight for $15 movement achieved its latest victory — the Fast Food Accountability and Standards Recovery Act[8] (FAST Act), which creates a Fast Food Council of state-appointed employer, employee, and government representatives to set minimum wages and employment standards for the fast-food industry.[9] The Act is a bold attempt at participatory democracy, but its design opens it up to preemption-based challenges. Far from being preempted, however, the FAST Act should serve as a model for local legislation to protect workers' rights.

AB 257 was originally introduced by Assemblymember Lorena Gonzalez in January 2021 but failed on the Assembly floor by three

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[1] *See About Us*, FIGHT FOR $15, https://fightfor15.org/about-us [https://perma.cc/QU63-W65Z].

[2] *See id.*; Dominic Rushe, *"Hopefully It Makes History": Fight for $15 Closes in on Mighty Win for US Workers*, THE GUARDIAN (Feb. 13, 2021, 5:00 AM), https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights [https://perma.cc/BV62-35P3]; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 51 (2016).

[3] Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686 (2008) ("[M]ost scholars believe that the NLRA is a failed regime." *Id.* at 2685–86.).

[4] 29 U.S.C. §§ 151–169.

[5] Lela Nargi, *An Inside Look at Union Organizing in the Fast Food Industry*, CIV. EATS (Dec. 7, 2021), https://civileats.com/2021/12/07/an-inside-look-at-union-organizing-in-the-fast-food-industry [https://perma.cc/PX4D-VQLN].

[6] Andrias, *supra* note 2, at 61. Even if unionizing is successful, since many fast-food workers work at franchises, joint-employment rules make it next to impossible to bring fast-food companies to the bargaining table. *See* Eric Morath, *Labor Rule Impedes Fast-Food, Contract Workers' Ability to Unionize*, WALL ST. J. (Feb. 25, 2020, 12:15 PM), https://www.wsj.com/articles/labor-rule-impedes-fast-food-contract-workers-ability-to-unionize-11582638300 [https://perma.cc/5629-EF6Q].

[7] Of the more than eight-and-a-half million food-service workers in the United States, only 1.7% are represented by unions, the lowest rate of any industry in the country. Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 19, 2023), https://www.bls.gov/news.release/union2.t03.htm [https://perma.cc/TRH9-KEFC].

[8] Assemb. B. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted) (codified at CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)).

[9] LAB. § 1471(b).

votes in June 2021.[10] An amended version of the bill was reintroduced in January 2022, and, after further amendments, the bill passed by a bare majority in the Senate.[11] After passing the Assembly, the bill was signed into law by Governor Gavin Newsom on September 5, 2022.[12] The Act is the result of collective action by fast-food workers across California who filed hundreds of health, safety, and wage complaints during the COVID-19 pandemic and went on strike to demand better conditions and passage of the bill.[13] The legislative findings describe the "abuse, low pay, few benefits, and minimal job security" of fast-food workers; the prevalence of "wage theft, sexual harassment and discrimination"; and the industry's "heightened health and safety risks,"[14] which were exacerbated by the pandemic.[15] Accordingly, the purposes of the Council are "to establish sectorwide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of, and to supply the necessary cost of proper living to, fast food restaurant workers," as well as to coordinate state agency responses to those issues.[16]

The Council is composed of ten members: one representative each of the Department of Industrial Relations and the Governor's Office of Business and Economic Development, two of fast-food franchisors, two of franchisees, two of employees, and two of advocates for employees.[17]

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[10] *Bill Votes, AB-257 Food Facilities and Employment*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220AB257 [https://perma.cc/HY6X-TXDD] (to see information about the bill as originally introduced, select "01/15/21 - Introduced" from the "Version" dropdown menu at the top right of the page, then click the "Status" tab).

[11] *Id.* The amended version of the bill capped the minimum wage at $22, reduced the number of government representatives on the Council, and removed franchisor joint liability for labor law violations made by franchisees. Jaimie Ding & Suhauna Hussain, *California Legislature Passes Bill to Protect Fast-Food Workers*, L.A. TIMES (Aug. 29, 2022, 7:38 PM), https://www.latimes.com/business/story/2022-08-29/california-senate-pass-bill-fast-food-workers [https://perma.cc/YF2R-Y7R2].

[12] Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Legislation to Improve Working Conditions and Wages for Fast-Food Workers (Sept. 5, 2022), https://www.gov.ca.gov/2022/09/05/governor-newsom-signs-legislation-to-improve-working-conditions-and-wages-for-fast-food-workers [https://perma.cc/TX8P-DVXJ].

[13] Press Release, Fight for $15, On Labor Day, Gov. Newsom Signs Landmark Bill to Give Voice to More than Half Million Fast-Food Workers (Sept. 5, 2022), https://fightfor15.org/on-labor-day-gov-newsom-signs-landmark-bill-to-give-voice-to-more-than-half-million-fast-food-workers [https://perma.cc/5X4C-GD4L].

[14] Assemb. B. 257 § 2(a), 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted).

[15] "Numerous complaints" filed by workers showed employers "routinely . . . flouted protections." *Id.* § 2(f). The legislature found the health and safety risks to workers and the public "serious and unacceptable," *id.* § 2(g), and noted that companies "profited during the pandemic" while their workers remained unable to participate in a "more equitable economy," *id.* § 2(h).

[16] CAL. LAB. CODE § 1471(b) (West Supp. 2023). In addition to wages and workplace safety, working conditions also include "the right to take time off work for protected purposes, and the right to be free from discrimination and harassment in the workplace." *Id.* § 1470(h). The Council cannot set standards for paid time off or predictable scheduling but may make a recommendation to the legislature to enact laws regarding the former. *Id.* § 1471(d)(2)(B)(7)–(8).

[17] *Id.* § 1471(a)(1). The Speaker of the Assembly and the Senate Rules Committee each appoint one representative of employee advocates; the Governor appoints all other members. *Id.* § 1471(a)(2).

Its standards cover all workers employed by a restaurant that is part of a fast-food chain, meaning it has one hundred or more establishments nationwide that share a common brand or standardized services.[18] The Council may set a minimum wage as high as $22 in 2023, with that cap increasing at a set rate each year.[19] The Council must conduct a full review of minimum standards at least once every three years,[20] and it must hold public meetings no less than once every six months in metropolitan areas across the state where fast-food workers and the public will have the opportunity to be heard on issues of industry conditions.[21]

Once the Director of Industrial Relations receives "a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees,"[22] the Council shall promulgate these minimum standards, decided by majority vote, and submit them to the labor committees of the legislature by January 15.[23] The standards take effect October 15 of that year at the earliest, but the legislature may pass legislation to prevent them from going into effect.[24] The Council is empowered to direct and coordinate with the Governor and government agencies,[25] and where its standards conflict with any existing regulations, the Council's standards apply.[26] The Act makes an exception for standards in collective bargaining agreements that provide better protection than a conflicting Council-promulgated standard.[27] Failure to abide by these standards is unlawful, and compliance is enforced by the Labor Commissioner and Division of Labor Standards Enforcement pursuant to their enforcement procedures as well as any which the Council may promulgate.[28] The Council will cease operations

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[18] *Id.* § 1470(a).

[19] *Id.* § 1471(d)(2)(B).

[20] *Id.* § 1471(f). The Council is constrained by a one-way ratchet: any new regulation cannot be less protective or beneficial than the one it replaces. *Id.*

[21] *Id.* § 1471(g). In cities or counties of more than 200,000 people, the Act allows for the establishment of "Local Fast Food Councils" — composed of at least one fast-food franchisor or franchisee, one fast-food worker, and a majority of representatives from relevant local agencies — which also host public meetings and may provide the Council with recommendations. *Id.* § 1471(i).

[22] *Id.* § 1471(c)(2).

[23] *Id.* § 1471(d)(1)(A)–(B).

[24] *Id.* § 1471(d)(1)(B).

[25] *Id.* § 1471(c)(1).

[26] *Id.* § 1471(d)(1)(A). Where contemplated standards fall within the jurisdiction of the Occupational Safety and Health Standards Board, however, the Council is not authorized to promulgate those standards but shall petition the Board to adopt them. *Id.* § 1471(e). The Board must respond within six months, or three months in an emergency. *Id.*

[27] *Id.* § 1471(k)(3). The collective bargaining agreement's standard applies so long as the agreement provides "a regular hourly rate of pay not less than 30 percent more than the state minimum wage for those employees, . . . [it] provides equivalent or greater protection than the standards established by the council," and state law on the issue authorizes such an exception. *Id.*

[28] *Id.* § 1471(k)(1). The Commissioner can investigate an alleged violation, order temporary relief by issuing a citation, and initiate a civil action for which a court may grant injunctive relief. *Id.* § 1471(k)(2). The Act also protects workers from employer retaliation for whistleblowing, testifying before any council, or refusing to work based on a serious safety concern, providing the worker with a right of action and entitling them to reinstatement and treble damages. *Id.* § 1472(a)–(b).

on January 1, 2029.[29]

The FAST Act is an important attempt to create a participatory legislative structure to protect workers within the NLRA regime. Where federal labor law has failed an entire industry, California has stepped in to create a political structure that is responsive to workers' needs. In many ways, this approach is nothing new: state legislatures, including the California Assembly, often delegate quasi-legislative authority to expert boards;[30] and wage councils proliferated in the Progressive and New Deal Eras.[31] But one likely challenge to the Act is rooted in an unlikely source: the NLRA itself. While the NLRA grants workers the affirmative right to unionize and bargain collectively, it also preempts any state and local legislation attempting to regulate the same.[32] But any preemption challenges to the Act should fail. State minimum labor standards are not preempted by the NLRA, and the Council's structure does not displace the NLRA's private collective bargaining regime. Instead, states and municipalities should look to the FAST Act's structure as an effective way to protect workers through employment legislation, especially in industries where unionizing is untenable.

Though nothing in the NLRA expressly states that it preempts state legislation, a series of Supreme Court decisions has elaborated a broad implicit preemption regime that rivals that of most other federal statutes.[33] In its landmark 1959 decision *San Diego Building Trades Council v. Garmon*,[34] the Court held that if an activity is "arguably" protected or prohibited by the NLRA, states do not have jurisdiction to regulate that activity because allowing them to do so "involves too great a danger of conflict with national labor policy."[35] The Court elaborated a separate and even more expansive preemption regime in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*,[36] holding that an activity can be "protected"[37] under the NLRA where Congress intended it to be left unregulated as a "permissible 'economic

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[29] *Id.* § 1471(m). If the Council is inoperative on that date, the minimum wage for fast-food workers will continue to increase annually at a set rate. *Id.* § 1473.

[30] Catherine L. Fisk & Amy W. Reavis, *Protecting Franchisees and Workers in Fast Food Work*, AM. CONST. SOC'Y (Dec. 2021), https://www.acslaw.org/wp-content/uploads/2021/12/Fisk-Reavis-IB-Final5662.pdf [https://perma.cc/4NXM-QLTE].

[31] *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 650–53 (2019) ("By 1938, twenty-five states had some form of minimum wage law. . . . [N]early all of these early wage-and-hour statutes used some form of industry committee . . . ." *Id.* at 652.); *id.* at 667–69 (describing the Fair Labor Standards Act's tripartite industry committees that set wages by industry).

[32] Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011).

[33] *See id.* at 1154.

[34] 359 U.S. 236 (1959).

[35] *Id.* at 245–46.

[36] 427 U.S. 132 (1976).

[37] *Id.* at 141 (quoting NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 492 (1960)).

weapon[]'" wielded by parties in the collective bargaining process.[38] In addition to "arguably" protected activities, activities intended to be "controlled by the free play of economic forces" are also preempted.[39] Any local attempt to regulate those activities enters into the "substantive aspects of the bargaining process" and is thus preempted.[40] Under *Machinists*, the "crucial inquiry" is whether the local regulation at issue "would frustrate effective implementation of the Act's processes."[41] However, because "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms" reached through that process,[42] "state laws of general application" that set minimum standards of employment — like the FAST Act — are not preempted so long as they do not interfere with the NLRA's collective bargaining process.[43]

But the FAST Act's ambitious design could face an equally ambitious challenge under *Machinists*. The argument might go something like this: by creating a forum for labor and management to negotiate binding employment standards, the Act replaces the NLRA's collective bargaining regime with its own alternative bargaining process to effectively define all "the substantive aspects of the bargaining process" for the fast-food industry.[44] With employer and employee representatives deciding on comprehensive industry standards, the Act's challengers will argue that the Council does not simply "form a 'backdrop'" against which fast-food "employers and employees come to the bargaining table."[45] Rather, they will argue, it forms the bargaining table itself.[46]

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[38] *Id.* (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 489).

[39] *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); *see also id.* at 150.

[40] *Id.* at 149–51 (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

[41] *Id.* at 147–48 (quoting Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

[42] Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985); *see also id.* at 754.

[43] *See id.* at 753–54 ("The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment." *Id.* at 754.).

[44] *Machinists*, 427 U.S. at 149 (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

[45] Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (quoting *Metro. Life*, 471 U.S. at 757).

[46] Indeed, fast-food-industry attorneys are already suggesting these arguments as potential challenges to the Act. *See, e.g.*, Riley Lagesen et al., *How the NLRA May Slow Down the FAST Act*, GREENBERG TRAURIG LLP (Oct. 14, 2022), https://www.gtlaw.com/en/insights/2022/10/published-articles/how-the-nlra-may-slow-down-the-fast-act [https://perma.cc/Q6MX-BHK4] ("By requiring another form of collective bargaining, the FAST Act may face challenges arguing that it interferes with or is preempted by federal law under the National Labor Relations Act."). And because the bargaining table is such a familiar labor paradigm, even the Act's proponents have used that language when referring to the Council. Service Employees International Union president Mary Kay Henry told Bloomberg News that "the bill effectively offers 'another form of collective bargaining' for fast food workers." Josh Eidelson, *California Moves to Give Fast Food Workers More Power, Heeding "Fight for $15*," BLOOMBERG NEWS (Aug. 29, 2022, 6:12 PM), https://www.bloomberg.com/news/articles/2022-08-29/california-moves-to-give-fast-food-workers-say-in-regulations [https://perma.cc/ENV7-ZLHA]. Union leaders might be forgiven for using collective bargaining language more abstractly to describe how the Act amplifies workers' political voices in setting employment standards, but the phrase is legally inapt.

Situating this atmospheric argument within the governing doctrine, two distinct preemption challenges emerge, both of which prove unavailing. The first is to the Act's substantive standards. Challengers are likely to argue that the Council's broad mandate to set industry-specific standards effectively defines the terms of fast-food employment contracts and thus interferes with the collective bargaining process. This idea has not been directly addressed by the Supreme Court, but it has received attention from the Ninth Circuit, whose precedent would likely control any challenge to the Act. In *Chamber of Commerce of the United States v. Bragdon*,[47] the Ninth Circuit found that the NLRA preempted a Costa County ordinance requiring employers in certain private industrial construction projects to pay a prevailing wage set by reference to industry collective bargaining agreements.[48] The panel based its holding on the fact that the ordinance applied only to "particular workers in a particular industry and [was] developed and revised from the bargaining of others."[49] In dicta, it went further, stating that "in the extreme, the substantive requirements could be so restrictive as to virtually dictate the results of the contract," thus interfering with the "free-play of economic forces" in the bargaining process.[50] In subsequent decisions, however, the Ninth Circuit has "made a significant retreat" from *Bragdon*, "effectively revers[ing]" its holding with respect to single industry standards[51] and limiting its application to "extreme situations."[52]

Even applying *Bragdon*'s dicta, nothing about the Act is "extreme." In *Bragdon*, the law at issue set a prevailing wage based on other collective bargaining agreements, forcing the employer to pay that wage rate whether it entered into an agreement or not — effectively "eviscerat[ing] the purpose of collective bargaining negotiations."[53] In contrast, the Council can set only a traditional minimum wage, capped by numbers hardcoded into the Act by the legislature.[54] The Council's

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[47] 64 F.3d 497 (9th Cir. 1995).

[48] *Id.* at 498–99, 504.

[49] *Id.* at 504.

[50] *Id.* at 501 (quoting Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 140 (1976)).

[51] Fortuna Enters., L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000, 1010–11 (C.D. Cal. 2008) (citing Associated Builders & Contractors of S. Cal., Inc. v. Nunn, 356 F.3d 979, 990 (9th Cir. 2004)); *see Nunn*, 356 F.3d at 990 (citing Dillingham Constr. N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 1034 (9th Cir. 1999); Nat'l. Broad. Co. v. Bradshaw, 70 F.3d 69, 71–73 (9th Cir. 1995); Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996)) ("It is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.").

[52] *Nunn*, 356 F.3d at 990.

[53] *Fortuna Enters.*, 673 F. Supp. 2d at 1009 (discussing *Bragdon*, 64 F.3d at 502–04).

[54] *See* CAL. LAB. CODE § 1471(d)(2)(B) (West Supp. 2023); *see also Bragdon*, 64 F.3d at 502 (finding ordinance preempted because its "specific minimum wage and benefits" for "specific construction projects" derived from collective bargaining agreements "affect[] the bargaining process in a much more invasive and detailed fashion" than "a minimum wage law, applicable to all employees, guarantying a minimum hourly rate.").

ability to set other minimum employment standards is constrained as well: the Act expressly prohibits regulation of paid time off or work scheduling, and the Council's mandate is limited to "wages, working hours, and other working conditions *adequate to ensure and maintain the health, safety, and welfare* of . . . fast food restaurant workers."[55] The Council's standards do not intrude into private collective bargaining at all — in fact, the Act explicitly provides an *exception* for collective bargaining agreements.[56] Moreover, other courts have upheld far more "extreme" regulations like for-cause protection,[57] including at the industry level,[58] most recently for fast-food workers in New York City.[59] Like any minimum standards, the Council's regulations simply set a backdrop for, but do not "dictate the results of,"[60] collective bargaining.

The second preemption challenge concerns the Council's structure. To start, the Supreme Court in *Chamber of Commerce of the United States v. Brown*[61] stated that "[i]n NLRA pre-emption cases, 'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'"[62] Because states can set minimum employment standards, it should be irrelevant whether those standards are set through legislation, a wage board, or a fast-food council.[63] In the eyes of its challengers, however, the FAST Act creates a separate forum for sector-wide bargaining, infringing not only on a single economic weapon but on the entirety of "economic forces" of the collective bargaining regime.[64]

But that argument falls flat. The Council's structure is not novel: the Progressive Era saw over a dozen states establish commissions to set industry wages and standards, including California's own Industrial Welfare Commission (IWC), a tripartite board consisting of employer, worker, and state representatives.[65] In 2015, Fight for $15 pressured New York State into creating a tripartite wage board that raised the

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55 LAB. § 1471(b) (emphasis added).

56 *Id.* § 1471(k)(3); *see* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) ("If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, surely one that permits such bargaining cannot be pre-empted." (citation omitted)).

57 *See, e.g.*, St. Thomas–St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands, 218 F.3d 232, 246 (3d Cir. 2000).

58 *See* R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 33 (1st Cir. 2011).

59 Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366, 372–74 (S.D.N.Y. 2022).

60 Chamber of Com. of the U.S. v. Bragdon, 64 F.3d 497, 501 (9th Cir. 1995).

61 554 U.S. 60 (2008).

62 *Id.* at 69 (quoting Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 n.5 (1986)).

63 *Cf. id.* ("California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.").

64 *See* Andrias, *supra* note 2, at 91; Lagesen et al., *supra* note 46.

65 Nelson Lichtenstein, *Sectoral Bargaining in the United States: Historical Roots of a Twenty-First Century Renewal*, *in* THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 87, 88–90 (Angela B. Cornell & Mark Barenberg eds., 2022). The IWC is "currently inoperative." *Id.* at 90.

minimum wage to $15 for fast-food workers.[66] Like these boards, the Council is a creature of old-fashioned political, not workplace, democracy. Employer and employee representatives are chosen by elected officials, and where there is any disagreement, government representatives have tiebreaking votes.[67] The legislature retains full control over whether these standards become law and can pass legislation to prevent them from taking effect. Moreover, there is no "bargaining" at all: there are no "economic weapons" to be wielded in a two-sided adversarial battle, only multi-party political deliberations. The table is round, not square. Though it may expand democratic participation, the Act does not provide an alternative avenue for workplace organization, self-determination, or collective bargaining, such that it might undermine those processes in the NLRA — the crucial inquiry in *Machinists*.

In both substance and form, the FAST Act sits squarely outside the bounds of NLRA preemption. When the NLRA established a regime of private collective bargaining, it did not mean to foreclose public policy as a recourse for workers to seek greater protection.[68] What is at stake here is greater than employment terms — it is how democracy itself can be leveraged to protect workers. Where "ossified" federal labor law provides no help in practically un-unionizable workplaces,[69] the FAST Act forms part of a growing trend of local legislation that expands workplace protections by involving workers in the political process.[70] The Act's fate will ultimately be decided by referendum vote after fast-food companies poured over $13 million into a signature-gathering campaign to place the law on the ballot in 2024.[71] Whatever the result, fast-food workers have made clear that they demand a change. Whether it's for a union, a living wage, or better working conditions, the fight continues.

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[66] Andrias, *supra* note 2, at 64–66.

[67] *See* CAL. LAB. CODE § 1471(a)(2) (West Supp. 2023); *see id.* § 1471(d)(1)(A) ("Decisions by the council . . . shall be made by an affirmative vote of at least six . . . members.").

[68] *See* Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 87 (2d Cir. 2015) ("*Machinists* preemption is not a license for courts to close political routes to workplace protections simply because those protections may also be the subject of collective bargaining." (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21–22 (1987))).

[69] *See generally* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

[70] Aurelia Glass & David Madland, *Worker Boards Across the Country Are Empowering Workers and Implementing Workforce Standards Across Industries*, CTR. FOR AM. PROGRESS (Feb. 18, 2022), https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries [https://perma.cc/4CT2-BLTM] (discussing growth of tripartite boards in four states and three cities since 2018). These are examples of what Professor Kate Andrias has called "social bargaining," Andrias, *supra* note 2, at 8, and Professor Cynthia Estlund has called "sectoral co-regulation," Cynthia L. Estlund, Sectoral Solutions that Work: The Case for Sectoral Co-regulation 2–4 (Nov. 23, 2022) (unpublished manuscript) (on file with the Harvard Law School Library), a promising alternative model for building worker power in the new economy.

[71] Aneurin Canham-Clyne, *FAST Recovery Act Referendum Approved, Opening Political Duel in California*, REST. DIVE (Jan. 25, 2023), https://www.restaurantdive.com/news/fast-recovery-act-referendum-opens-political-duel-in-california/641196 [https://perma.cc/XGY6-VSAD].

Applicant Details

First Name	**David**
Last Name	**Cremins**
Citizenship Status	**U. S. Citizen**
Email Address	**dcremins@stanford.edu**
Address	**Address** **Street** **1700 Sand Hill Road, Apartment 304** **City** **Palo Alto** **State/Territory** **California** **Zip** **94304** **Country** **United States**
Contact Phone Number	**2816156375**

Applicant Education

BA/BS From	**Pomona College**
Date of BA/BS	**June 2018**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 11, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Letter, Dean's
deansletter@law.stanford.edu
650-723-4455

Ablavsky, Greg
ablavsky@law.stanford.edu

Brodie, Juliet
jmbrodie@law.stanford.edu
(650) 725-9200

Reese, Elizabeth H.
ereese@law.stanford.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DAVID CREMINS

1700 Sand Hill Road, Apartment 304, Palo Alto, CA 94304 | dcremins@stanford.edu | 281-615-6375

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals
for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 5401

Dear Judge Robinson:

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk in 2024-25. I am particularly interested in clerking for you given your background in civil rights advocacy and reputation as a public interest mentor and sharp jurist.

It took me a couple of years after graduating college to realize that legal work would be a good fit for me. I was inspired by immigration attorneys I met doing volunteer translation projects, and serving migrant populations via litigation is still my primary goal for my legal career. I was lucky as a 1L at Stanford to join the Workers' Rights Pro Bono Project, which introduced me to the intersection of employment and immigration law. I then set out to explore the field of migrant workers' advocacy last summer with Centro de los Derechos del Migrante, Inc. in Mexico City, a journey I will continue this summer via internships with Resilience Force and the California Department of Justice Worker Rights and Fair Labor Section. After clerking, I plan to join an agency, plaintiff-side firm, or non-profit dedicated to advocating for, and alongside, migrant workers. I hope that a year in your chambers will prepare me to be an excellent lawyer, as I give all I can to advance the critical work on your docket.

Please find enclosed my resume, references, transcripts, and writing sample. Professors Gregory Ablavsky, Elizabeth Hidalgo Reese, and Juliet Brodie have also sent letters of recommendation in support of my application.

Thank you for your consideration, and I hope to speak with you and your clerks soon!

Sincerely,

David Cremins

DAVID CREMINS

1700 Sand Hill Road, Apartment 304, Palo Alto, CA 94304 | dcremins@stanford.edu | 281-615-6375

EDUCATION

Stanford Law School, Stanford, CA — Juris Doctor, expected June 2024
Honors: Gerald Gunther Book Prize for Outstanding Performance in *Federal Indian Law*
Journal: *Stanford Law & Policy Review* (Volume 34: Lead Notes Editor)
Activities: Workers' Rights Pro Bono (Project Leader), Stanford Law Students for Climate Action (Founding Member), Stanford Immigration & Human Rights Law Association (Co-President), Public Interest Law Foundation (VP, Student Initiatives), National Lawyers Guild (Board Member), Shaking the Foundations Conference (Organizer), Law School Musical (Writer/Performer)
Publications: *Climate of Coercion* (co-authored report, presented at Law & Society Association Conference)

Pomona College, Claremont, CA — Bachelor of Arts, *cum laude*, in Cognitive Science, May 2018
Honors: Fletcher Jones Thesis Prize, Dean's List in Fall 2014, Spring 2015, Fall 2016, and Spring 2018
Thesis: "Music and Language: Exploring Evidence of Shared Neural Processing"
Activities: Pomona College Writing Center (Head Writing Partner), Musicians' Coalition (President), Residential Sponsor, Mock Trial, Violin Tutor, Hunger and Homelessness Initiative, Summer Undergraduate Research Project (2015, 2016), Fall 2016 in the University of Buenos Aires

EXPERIENCE

Resilience Force, Remote — *Intern*, August – September 2023

California Dep't of Justice, Worker Rights and Fair Labor Section, Oakland, CA — *Intern*, June – August 2023

Earth Refuge, Remote — *Legal Database Manager*, January 2022 – Present
Draft and edit summaries of cases from jurisdictions around the world related to climate-induced migration.

Stanford Law School, Stanford, CA
Professor Lucas Guttentag, Immigration Policy Tracking Project — *Research Assistant*, June 2022 – Present
Help maintain database of immigration policy changes, including curation of entries from other contributors.
Robin Linsenmayer, *Federal Litigation in a Global Context* — *Teaching Assistant*, January – June 2023
Taught and graded brief citation techniques and oral argument presentations for required first-year course.
Community Law Clinic — *Clinical Student*, April – June 2023
Worked with other student attorneys on eviction defense, disability benefits, and record expungement cases.

Centro de los Derechos del Migrante, Inc., Mexico City — *Summer Law Clerk*, June – August 2022
Researched and wrote memoranda, blogs, and FOIA requests on the rights of migrants with guest work visas.
Conducted intake interviews with workers, answering questions and screening for remediable violations.

Oasis Legal Services, Berkeley, CA — *Asylum Case Intern*, January – August 2021
Prepared declarations and documents with low-income, LGBTQ+ migrants for affirmative asylum cases.

Workday, Inc., Pleasanton, CA — *Software Application Engineer*, August 2018 – January 2021
Provided technical, design, and organizational leadership for student account and payment plan products.

Pro Bono Work, Various Locations — January 2017 – Present
- Conduct Spanish-English and Portuguese-English translation of documents for **Public Counsel** (Los Angeles, CA), **Asylum Access** (Oakland, CA), and **Santa Fe Dreamers Project** (Santa Fe, NM).
- Provided in-person and online Spanish-English translation and assistance with asylum applications for **Immigrant Legal Defense** (San Francisco, CA), mental health evaluations for **Centro Legal de la Raza** (Oakland, CA), and citizenship applications for **International Rescue Committee** (Santa Clara, CA).
- Observed court and recorded data on eviction proceedings in Harris County with **Texas Housers**.
- Distributed information about eviction protection programs in Harris County with **Gulf Coast AFL-CIO**.
- Led January 2023 pro bono trip to Tijuana with **U.S. Committee for Refugees and Immigrants**.

EXTRA

Speak Spanish (proficient) and Portuguese (conversational); play several instruments; *The Moth* storytelling competition champion; Irish/U.S. citizenship; published in *The Nation*, *Points in Case*, and *East Bay Majority*

DAVID CREMINS

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RECOMMENDERS

Gregory Ablavsky
Marion Rice Kirkwood Professor of Law
Stanford Law School
ablavsky@law.stanford.edu
650-723-4057

Juliet Brodie
Director of the Stanford Community Law Clinic and Professor of Law
Stanford Law School
jmbrodie@law.stanford.edu
650-725-9200

Elizabeth Hidalgo Reese
Senior Policy Advisor
White House Policy Council
Assistant Professor of Law
Stanford Law School
ereese@law.stanford.edu
650-723-0981

REFERENCES

Lucas Guttentag
Professor of the Practice of Law
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Ben Botts
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855-234-9699

Alicia Thesing
Director of Legal Research and Writing
Stanford Law School
athesing@stanford.edu
650-725-6867

Robin Linsenmayer
Lecturer in Law
Stanford Law School
rlinsenmayer@stanford.edu
628-432-5124

Mike Gaitley
Senior Staff Attorney
Legal Aid at Work
mgaitley@legalaidatwork.org
415-828-5224

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Cremins,David
Student ID : 05934188

Print Date: 05/02/2023

-------- Academic Program --------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

-------- Beginning of Academic Record --------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	H	
Instructor:		Freeman Engstrom, David				
LAW	205	CONTRACTS	5.00	5.00	H	
Instructor:		Sanga, Sarath				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	P	
Instructor:		Thesing, Alicia Ellen				
LAW	223	TORTS	5.00	5.00	H	
Instructor:		Mello, Michelle Marie Studdert, David M				
LAW	241K	DISCUSSION (1L): GOVERNING POVERTY	1.00	1.00	MP	
Instructor:		Anderson, Michelle W				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	H	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Fan, Mary D.				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	H	
Instructor:		Linsenmayer Colman, Robin Anne				
LAW	2520	CLIMATE LAW AND POLICY	3.00	3.00	H	
Instructor:		Donahue, Sean H Narayan, Sanjay				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 30.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
EMED	110	BASIC CARDIAC LIFE SUPPORT & FIRST AID	1.00	1.00	CR	
Instructor:		Thompson, Antja Jean				
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:		Linsenmayer Colman, Robin Anne				
LAW	808P	POLICY PRACTICUM: SUING TO STOP CLIMATE CHANGE: CASE STUDIES IN INTERNATIONAL CLIMATE LITIGATION	2.00	2.00	H	
Instructor:		Hensler, Deborah R				
LAW	7025	EMPLOYMENT LAW	3.00	3.00	P	
Instructor:		Morantz, Alison				
LAW	7846	ELEMENTS OF POLICY ANALYSIS	1.00	1.00	MP	
Instructor:		Brest, Paul MacCoun, Robert J				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 42.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	3504	U.S. LEGAL HISTORY	3.00	3.00	H	
Instructor:		Ablavsky, Gregory R				
LAW	5040	LAW, LAWYERS, AND TRANSFORMATION IN DEMOCRATIC SOUTH AFRICA	3.00	3.00	H	
Instructor:		Liu, Mina Titi O'Connell, James				
LAW	7030	FEDERAL INDIAN LAW	3.00	3.00	H	
Instructor:		Reese, Elizabeth Anne				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	7828	TRIAL ADVOCACY WORKSHOP	5.00	5.00	MP	
Instructor:		Kim, Sallie Owens, Traci Peters, Sara M				

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Cremins,David
Student ID : 05934188

LAW TERM UNTS: 14.00 LAW CUM UNTS: 56.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	6004	LEGAL ETHICS: THE PLAINTIFFS' LAWYER	3.00	3.00	P	
Instructor:		Engstrom, Nora Freeman				
LAW	7026	IMMIGRATION LAW	3.00	3.00	H	
Instructor:		Guttentag, Lucas				
PORTLANG	12A	ACCELERATED SECOND-YEAR PORTUGUESE, PART 2	4.00	4.00	CR	
Instructor:		Wiedemann, Lyris				

LAW TERM UNTS: 9.00 LAW CUM UNTS: 65.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	902A	COMMUNITY LAW CLINIC: CLINICAL PRACTICE	4.00	0.00		
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902B	COMMUNITY LAW CLINIC: CLINICAL METHODS	4.00	0.00		
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902C	COMMUNITY LAW CLINIC: CLINICAL COURSEWORK	4.00	0.00		
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 65.00

END OF TRANSCRIPT

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

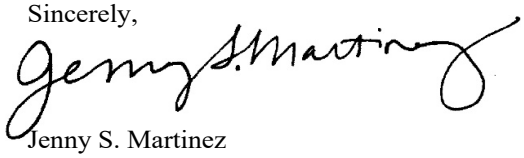
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Greg Ablavsky
Marion Rice Kirkwood Professor of Law
Professor, by courtesy, History
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-4057
ablavsky@law.stanford.edu

June 09, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to strongly recommend David Cremins for a clerkship in your chambers. David is not only a very strong student but an unusually thoughtful and committed one, too. I am confident he will make an excellent law clerk.

I taught David in my U.S. Legal History survey during his 2L fall. David was one of the twenty-eight students who opted to write response papers, but he earned the third-highest grade in the class. His response papers were consistently thoughtful and insightful. They were also often highly entertaining: David is a strong writer with a knack for an excellent turn of phrase. I thought that his final essay, on current battles over the role of history in present-day legal interpretation, was his strongest, in which he persuasively intervened to suggest the significance of popular historical and legal interpretation in these debates. In my comments, I observed, “Engaged very deeply and thoughtfully with the material, and had many interesting thoughts on the underlying questions.”

David’s strong performance in my legal history class is consistent with his strong performance at SLS more generally. David has received honors in most of his classes here, including nearly all of his core 1L doctrinals. He also received a class prize—limited to the very top 1-2 students in each class—in Federal Indian Law.

What makes this performance even more remarkable is how he has managed to maintain such high grades despite an extremely busy extracurricular schedule. I am somewhat amazed about all that he manages to balance while excelling academically: he has been a leader on the worker rights' pro bono, a founding member of the SLS Students for Climate Action, a co-president of the Immigration and Human Rights Law Association, as well as maintaining a substantial involvement in a half-dozen other organizations, including serving as a notes editor for the *Law & Policy Review*. He also was heavily involved—indeed, was one of the stars—in the student-authored and produced musical. I’m not entirely sure how he finds the time to do all of this on top of his coursework, but I think it speaks volumes about his work ethic and dedication to both learning and service.

In sum, David is a remarkable student—not just for his strong academic performance, though he is one of the standouts in his class, but for the level of his involvement in service throughout SLS. It is really quite amazing to witness. I am confident that he will bring this same dedication to clerking. I hope you will strongly consider his application; please feel free to reach out if I can provide any additional information.

Sincerely,

/s/ Greg Ablavsky

Juliet Brodie
Professor of Law
Director of the Stanford Community Law Clinic
559 Nathan Abbott Way
Stanford, California 94305-8610
650-724-2507
jmbrodie@law.stanford.edu

June 09, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write with enthusiasm to recommend David Cremins, who will graduate from SLS in 2024, as clerk in your chambers. I know David quite well, as I am directly supervising him in his clinical work at Stanford's Community Law Clinic (CLC) this quarter (spring of his 2L year). I thus have a strong basis on which to evaluate David's performance as a lawyer and colleague. Based on that experience, I recommend him enthusiastically and without reservation. Not only is he a very talented young lawyer, he is an outstanding human being and an absolute asset to any community, including a courthouse and a judge's chambers.

As you may know, clinics at SLS operate on a full-time basis; students enroll for a "clinic quarter," during which they take no other classes and engage as a full-time professional in this clinic work. CLC is a neighborhood-based legal services office on the east side of Palo Alto. Each clinic student carries a case load of several cases simultaneously representing low-income people in three practice areas: housing, social security disability, and criminal record expungement matters. Students take the lead in the full range of work associated with a legal services docket: fact investigation, legal research, interviewing, counseling, negotiating, and written and oral advocacy in state court and in administrative tribunals. They must quickly master the applicable legal scheme for each subject, while also forming productive and collaborative attorney-client relationships. Clinic work also requires participation in weekly seminars and case rounds, and a significant amount of reflective writing. In short, CLC is a legal workplace, where law students demonstrate how they will transition from student to professional. David performed exceptionally well in every regard.

I personally supervised David on an eviction defense matter that included taking his first deposition, counseling clients with unrealistic expectations, doing legal research on a little-used defense, and negotiating an exceptionally favorable outcome with one of our region's most experienced landlord attorneys. In all of this work, he co-counseled with a clinic peer and he also demonstrated excellent skills navigating shared workload and communications. I was very impressed by David's appetite for the hard work required, his analytic capacity, and his productivity. My colleagues who worked with David on his social security and post-conviction matters similarly praise his talents. Having worked for several years before starting law school, David brings a maturity to the professional setting that enables him to focus on the work (some less experienced peers are distracted by their own anxieties or are overwhelmed by the autonomy that law practice requires), and to great effect. David has oral presentation gifts; he explains things clearly, and delights in an iterative process of getting to the best work product. This is an exceptionally valuable quality in a law clerk.

David's maturity and self-knowledge have also propelled him to a leadership role in his clinic cohort and at the law school overall. Our clinic work involves multiple classroom sessions each week at which students variably absorb skills training, share their own practice experiences, and lead conversation on issues of common concern. David's participation is outstanding, and his peers clearly look forward to his comments. Mindful of the strength of his personality, and of the relative privilege he enjoys, he is attuned to group dynamics. But he is not at all reluctant to participate, and it is to our great collective advantage. His comments and questions are astute, productive, and mission-driven; while he is confident, he is not a show-off. In the large law school environment, too, David is looked to for leadership. He is a visible leader in many student organizations, and known as one of the public interest community's most active members. I have had numerous occasions to discuss with him even controversial issues in the SLS community and am always impressed by his intellectual honesty, his quick and deep understanding of complex issues, and his humility.

In short, I recommend David very highly as a clerk. He is a talented and dedicated young lawyer, who never fails to enliven a group's collective work and joy. He is hungry for meaningful work and will, in my estimation, be a credit to any organization with which he is aligned. Please do not hesitate to call upon me if I can provide any additional information.

Sincerely,

/s/ Juliet Brodie

Elizabeth Reese
Assistant Professor of Law
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-4185
ereese@law.stanford.edu

June 09, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write with my highest recommendation of David Cremins, Stanford Law JD24, for a clerkship position in your chambers. David is a brilliant legal mind and a passionate advocate for those who are the most in need. He will be an exceptional clerk and undoubtedly has a wonderful and impactful career ahead of him.

I first met David when he enrolled in my Federal Indian Law class in his 2L year. Federal Indian Law is a very difficult class to teach. It's a very strange combination of federal courts and race and the law—it can be very doctrinally dense and complex while also being unpredictable and inconsistent in manners that can only be explained by colonialism or neglect. David was a student I noticed right away because he was so clearly engaged in the full doctrinal complexities and injustices explored in the class. He was one of two students who sat next to each other, and both were clearly so prepared and cared about the material. From their facial expressions, I could tell they were thinking through the right questions and also the complex implications I was gesturing towards. I was completely unsurprised that David did fantastically the day he was the designated "expert" on a case. What I didn't expect is that he would also be so funny. He made the entire class laugh with the wit that he brought to the tricky contradictions within the legal arguments that he was explaining. It was masterful and utterly delightful.

David stopped by office hours one week to ask both doctrinal clarifying questions and a question that will stick with me. It was about the tension between fighting for more authority for tribal governments to prosecute broader swaths of crimes committed on their land and concerns about over-policing or needing to reform criminal justice systems. I think David cares passionately about these questions as well, so it was a very important conversation for him. A lot of people who are passionate about what they believe in don't always reckon with the hardest challenges to that. David does. He really cares about the world, and about the people who don't have access to power or justice within it. And he wants systems to work better for them far more than he wants to simply be right about a point. It is really a lovely thing to see as he thinks through his ideas, learns, and comes out the other side with more informed and nuanced opinions.

I was completely unsurprised when I unblinded my exams and saw that David had earned one of the prizes for top marks in my class. I wrote a very complex exam in the hopes that it would make it easier to grade. It certainly did. A lot of my students did fine, but I was a bit heartbroken that none of them seemed to be doing excellently, until I read David's exam. **David's exam broke my curve; it was that good.** Reading them blind, I would think of that exam as the joyous, wonderful one that I was excited to read each new part of to see if, once again, it was going to blow me away with how good it was.

David's transcript is great for a Stanford Law student—he has many Honors grades over the years, as you can see. But I'm honestly shocked that he doesn't have more prizes. His exam in my class was really that good. I suspect he has been close to missing a few prizes in other courses.

I also want to say a quick word about David's extracurriculars and campus leadership here at Stanford. David does a lot on campus—and most of it is directed at communities outside of Stanford's campus that need legal assistance. And he has gone even beyond that to try and bring the insights from some of that work to Stanford's campus, where his fellow students can also learn from these perspectives they might not otherwise interact with. David is undoubtedly a beloved and well-respected campus leader. It also makes all his academic achievements more impressive since he juggles them on top of the many things he has going on outside the classroom.

David is brilliant and impressive. He will have a fantastic legal career, and he will be a fantastic clerk. He will tackle complex legal issues, help you think through challenging questions, and do it all with a pleasant and calm disposition—then an occasional joke that will be a complete delight. I strongly encourage you to hire him as a law clerk.

Sincerely,

/s/ Elizabeth Reese

DAVID CREMINS

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This writing sample is a memorandum that I drafted during my summer 2022 internship with Centro de los Derechos del Migrante, Inc. (CDM). My assignment was to explore whether CDM and its organizational allies should pursue Title VII litigation on behalf of Mexican women who are excluded from temporary work visa jobs in the United States. I referenced previous work by CDM staff and volunteers, and incorporated feedback from one of my supervisors, Kristin Greer Love, but otherwise the work is entirely my own. I have received permission from CDM's Legal Director, Ben Botts, to use this memorandum as a writing sample.

To: Kristin Greer Love and Centro de los Derechos del Migrante, Inc. Legal Team
From: David Cremins
Date: August 2, 2022
RE: Extraterritorial Application of Title VII to Claims of Discriminatory Hiring Abroad

Overview

Since the 1990s, the Supreme Court has dramatically curtailed the circumstances under which U.S. laws can apply extraterritorially. In the employment context, U.S. courts are generally unwilling to extend legal protections to foreigners working or seeking to work for U.S. employers, absent evidence of legislative intent that such a population should be covered by a given statute.

Three cases from the past two decades tell a mixed story about whether claims brought under Title VII from abroad may be able to get around this presumption against extraterritoriality. *Reyes-Gaona* held that foreign labor recruitment practices are not subject to analysis under a similar federal employment law – the Age Discrimination in Employment Act – while *Olvera-Morales* refused to extend this reasoning to claims brought by foreign workers with a pre-existing connection to the United States. And in *Nahkid*, the D.C. District Court found that Title VII does not cover foreigners applying to U.S. jobs from abroad for the first time, reasoning which the Court of Appeals neither embraced nor shot down.

This patchwork of opinions indicates both promise and peril in litigating on behalf of would-be U.S. temporary visa workers who face hiring discrimination in their home countries. Because of this uncertainty, it may be advisable for CDM to explore other legal and political strategies to combat discrimination in H-2 and other visa programs before seeking an expansion of Title VII's extraterritorial scope.

Background

The Presumption Against Extraterritoriality

It is a longstanding principle that U.S. courts should apply U.S. law only to land and persons "within the territorial jurisdiction of the United States," unless Congress legislates otherwise.[1] However, the scope of this presumption against extraterritoriality has shifted dramatically over the years. In the nineteenth century, courts typically held that statutes should simply "be construed to avoid violations of international law."[2] And throughout most of the twentieth century, courts employed an "effects test, which generally [permitted] applying U.S. law

[1] *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)).
[2] *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1584-85 (2020).

to extraterritorial conduct as long as it [produced] effects within the United States," though this test was infrequently and inconsistently applied.[3] Then, in the 1990s, the doctrine on extraterritorial application began evolving quickly, starting with *EEOC v. Arabian American Oil Co*., 499 U.S. 244 (1991) (hereinafter *Aramco*). By the twenty-first century, this line of jurisprudence had become so convoluted that the Supreme Court found reason to articulate an entirely new test in *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247 (2010).

The *Morrison* standard, later refined by *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016), involves a two-step process.[4] First, to defeat the presumption against extraterritorial application, courts look for a "clear indication of an extraterritorial application" in a statute.[5] Failing that, courts will then consider if the "conduct relevant" to the *focus* of the statute occurred in U.S. territory, rendering a permissible domestic application of the statute.[6]

This fuzzy concept of a statute's focus "provides lower courts with little meaningful guidance in assessing which aspects of a statute" to consider.[7] *Morrison* and *Nabisco* also promulgated a domain-general approach to extraterritorial analysis which may not be well-suited to all areas of law. For instance, in determining whether U.S. employment and labor laws apply to workers abroad, some courts previously utilized more fact-sensitive "center of gravity" or "primary workstation" tests[8] – together, these can be called *job situs* theories[9] – which are now, presumably, supplanted.

It is also arguable that the Supreme Court began shifting away from consistent application of the *Morrison-Nabisco* test nearly as soon as it was announced. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), perhaps the most consequential extraterritoriality case of the last decade,

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[3] *See* Natascha Born, *The Presumption Against Extraterritoriality: Reconciling Canons of Statutory Interpretation with Textualism*, 41 U. PA. J. INT'L L. 541, 556-57 (2020); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (explicating how a statute may regulate conduct outside the United States, if such conduct was intended to, and did, have some impact within the country).

[4] This test was adopted by the Restatement (Fourth) of the Foreign Relations Law of the United States at § 404 (A.L.I. 2018). *See generally* Franklin A. Gevurtz, *Extraterritoriality and the Fourth Restatement Foreign Relations Law: Opportunities Lost*, MCGEORGE SCH. L. SCHOLARLY ARTICLES 496 (2019) (critiquing this enshrinement of *Morrison*).

[5] *Morrison*, 561 U.S. at 255.

[6] *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018).

[7] *See* Born, *supra* note 3, at 572.

[8] *See* Alina Veneziano, *The Extraterritoriality of U.S. Employment Laws: A Story of Illusory Borders and the Indeterminate Applications of U.S. Employment Laws Abroad*, 41 BERKELEY J. EMP. & LAB. L. 121, 149 (2020).

[9] *Job situs* theories stem from a line of cases employing a workplace-based test for extraterritoriality. *See, e.g.*, *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984) (dismissing an age discrimination suit because the job was located abroad); *Lopez v. Pan Am World Servs.*, 813 F.2d 1118 (11th Cir. 1987) (rejecting the idea that the place of decision is determinative in hiring discrimination case when work will be done abroad).

looked almost exclusively to the text of the Alien Tort Statute (28 U.S.C. § 1350) without applying the second step of *Morrison-Nabisco*,[10] despite the fact that this framework was supposed to move beyond a "clear statement rule."[11] This turn towards textualism in extraterritoriality cases has been criticized as fundamentally incompatible with the focus inquiry of *Morrison-Nabisco*, because it displaces "the best reading of the statutory text," which should take into account legislative history.[12]

All the same, most courts still apply *Morrison-Nabisco*,[13] so modern extraterritoriality analysis should flow from its two-step procedure. Therefore, absent clear textual permission for a statute to apply abroad, advocates for extraterritorial extension should concentrate on whether the "conduct regulated by [a] statute occurs within" the United States.[14]

The Extraterritorial Application of Federal Employment Statutes

In some contrast to other areas, such as securities and antitrust law, U.S. courts are generally reluctant "to extend U.S. employment laws abroad."[15] This tendency is best exemplified by the 1991 *Aramco* case, wherein the Supreme Court held that Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) did not extend to claims brought by a U.S. citizen working for a U.S. corporation but employed abroad.[16] By reviving, and extending, the assumption "that Congress legislates against the backdrop of the presumption against extraterritoriality,"[17] *Aramco* dismissed considerations such as the "importance of the *place* of decision," and the domestic *effects* of decisions made abroad.[18] Chief Justice Rehnquist's majority opinion also engaged in narrow textual analysis, at the expense of inquiring into the legislative record or exhausting other usual methods of statutory interpretation.[19] Finally, *Aramco* emphasized concerns about domestic courts

[10] *See Kiobel*, 569 U.S. at 117.
[11] *See Morrison*, 561 U.S. at 265.
[12] *See* Born, *supra* note 3, at 545.
[13] *See, e.g.*, *WesternGeco*, 138 S. Ct. at 2136.
[14] *See Extraterritorial Scope of Major U.S. Employment Laws* (WESTLAW/THOMSON REUTERS PRAC. L., LAB. & EMP.). This practice guidance also suggests that it is relevant whether "failure to apply the statute overseas causes adverse effects within" the United States, harkening back to the twentieth century effects test, mentioned above. And, indeed, some courts still seem to care about whether behavior abroad "touch[es] and concern[s] the United States with sufficient force to displace the presumption against extraterritoriality." *See Mastafa v. Chevron Corp.*, 770 F.3d 170, 187 (2d Cir. 2014). But this is not a widespread enough practice to depend on such analysis.
[15] Veneziano, *supra* note 8, at 133.
[16] *Aramco*, 499 U.S. at 247.
[17] *Id.* at 248.
[18] *See* Ryuichi Yamakawa, *Territoriality and Extraterritoriality: Coverage of Fair Employment Laws After EEOC v. Aramco*, 17 N.C. J. INT'L L. & COM. REG. 71, 109 (1992) (emphasis added).
[19] *See Aramco*, 499 U.S. at 261 (Marshall, J., dissenting).

encouraging foreign policy disputes, which might lead to "international discord,"[20] concerns which have figured prominently in subsequent extraterritoriality cases.[21]

Following *Aramco*, Congress amended Title VII to cover U.S. citizens working for U.S. corporations abroad, while only explicitly excluding from the statute's ambit non-U.S. citizens employed by U.S. corporations abroad.[22] Guidance from the EEOC in 1993 affirmed that these amendments extended the "extraterritorial application of both Title VII and the Americans [w]ith Disabilities Act [ADA; 42 U.S.C. § 12101]," further clarifying that "Title VII does generally cover aliens working inside the United States"[23] (including undocumented immigrants[24]). The Age Discrimination in Employment Act of 1967 (ADEA; 29 U.S.C. § 621) was similarly amended in 1984, such that all three statutes now encompass U.S. citizens employed abroad under their definition of "employee."[25]

While these amendments constituted a successful legislative reversal of *Aramco*, they also cemented the idea that Congress is capable, when it wants to, of explicitly expanding employment statutes to foreign soil and that, otherwise, it should be assumed that "Congress is primarily concerned with domestic conditions."[26] This makes it especially difficult to mount creative arguments around the application of Title VII and other federal employment statutes,[27] even though, mere decades ago, courts were more willing to start with the presumption that they "must give the language of civil rights statutes 'broad and inclusive effect,' and must extend their coverage to the outer limits permitted from a fair reading of the statute."[28]

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[20] *Id.* at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

[21] *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 745 (2020) (denying a *Bivens* claim brought by the parents of a teenager in Mexico killed by U.S. border patrol, in part due to the perceived risk of encouraging a foreign policy dispute).

[22] *See* Title VII § 702(a) (42 U.S.C § 2000e–1(a)) ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State.").

[23] *See* EEOC, *Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States* (Oct. 20, 1993), https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-title-vii-and-americans-disabilities-act-conduct. This guidance is silent on whether work in the United States extends to the hiring stage abroad.

[24] *See, e.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) (affirming anti-discrimination law applies to undocumented employees); *but compare with Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (denying backpay damages to undocumented immigrants who suffer from violations of federal labor law).

[25] *See* Veneziano, *supra* note 8, at 165.

[26] *See Foley Bros.*, 336 U.S. at 285.

[27] *See, e.g.*, *Shekoyan v. Sibley Int'l*, 409 F.3d 414 (D.C. Cir. 2005) (denying extension of Title VII to a U.S. lawful permanent resident employed by a U.S. corporation abroad).

[28] *See Hartman v. Wick*, 678 F. Supp. 312, 325 (D.C. Cir. 1988) (extending Title VII to claims by non-resident immigrants within the United States); *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (extending Title VII to the employment of non-resident immigrants in the United States, before the 1991 amendments).

Hiring Discrimination in U.S. Temporary Work Visa Programs

Centro de los Derechos del Migrante, Inc. (CDM), and its organizational allies, want internationally recruited workers[29] to be able to bring Title VII discriminatory hiring claims before they have worked in the United States.[30] This subsection of this Memorandum will briefly describe why this goal may be desirable, before the next section turns to whether it is feasible.

CDM's work has found that "gender bias, lack of government oversight over recruitment, and the failure of the United States to enforce anti-discrimination and other labor and employment laws extraterritorially, conspire to permit employers and their recruiter agents to track women into visa categories and job sectors with lower wages, unequal income-earning opportunities, and fewer rights protections than their male counterparts."[31] There is little doubt this behavior, if analyzed under Title VII, could constitute a severe, adverse, and disparate impact[32] on women,[33] and that U.S. employers could be considered "complicit in, and liable for, discriminatory hiring when they ignore that their workforces do not have gender balance that is representative of the labor pool."[34]

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[29] This Memorandum focuses on H-2 workers, but its analysis is relevant to other visa "guest" work programs, including TN.

[30] This Memorandum focuses on sex discrimination as controlled by Title VII, which prohibits hiring, limiting, or firing employees because of their "race, color, religion, sex, or national origin." Title VII § 703(a)(1-2) (42 U.S.C § 2000e–2(a)(1-2)). However, similar discussion should be applicable to claims of age discrimination under the ADEA. It is, of course, debatable whether expanding access to U.S. visa work programs is advisable, given rampant discriminatory behavior, not to mention other widespread workplace violations catalogued by CDM. *See, e.g.*, CDM and U. Pa. L. Sch. Transnat'l Legal Clinic, *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs* (July 6, 2018), https://cdmigrante.org/wp-content/uploads/2018/07/Engendering-Exploitation_policy-brief-7-6-18.pdf. It is also questionable whether, as a general matter, it is a positive thing to spread U.S. law across the world. *See Sacchi v. Argentina: Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test*, 135 HARV. L. REV. 1981, 1985 (2022) (arguing that "a larger shift to effects-centric jurisdiction risks an overall expansion of international jurisdiction that powerful states may appropriate to justify increased interventionism").

[31] *See* CDM, *Engendering Exploitation*, *supra* note 30, at 5.

[32] The disparate impact argument employed in a case like this might be premised on a theory of "status causation," wherein aggregate group outcomes serve as presumptive evidence of individualized disparate outcomes. *See* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017). This argument would not be needed, however, in cases where an explicitly discriminatory policy can be shown. There is, meanwhile, the risk that disparate impact theory will be dismantled altogether. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (denying class certification absent proof of an affirmative showing of a top-down discriminatory policy).

[33] *See* CDM, *Amended Petition on Labor Matters Arising in the United States* (Mar. 23, 2021), https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf. Statistical analysis in Appendix A of this Petition finds *prima facie* evidence of adverse impact discrimination against women in the H-2A visa program, in violation of the "four-fifths" rule enshrined in EEOC regulations. *See* 29 C.F.R. § 1607.4(D).

[34] *See id.* at 17. This gender imbalance is not in line with domestic labor force statistics – and therefore not a "bona fide occupational qualification," a defense against Title VII liability – especially in the H-2A program, in which over 95% of visa holders are men. *See* U.S. Gov. Accountability Office, *GAO-15-154, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* (Mar. 2015), https://www.gao.gov/assets/690/684985.pdf at 18.

As CDM's advocacy has demonstrated, the Mexican and U.S. governments' disinterest in and/or inability to enforce their anti-discrimination laws (which are substantially similar[35]), stands in probable violation of several provisions of the United States-Mexico-Canada Agreement (USMCA).[36] Further, the U.S. government may be enabling employers to violate Title VII, or itself violating the Administrative Procedure Act (5 U.S.C. §§ 551–59), by knowingly administering visa programs which discriminate on the basis of sex.[37]

Allowing such discriminatory behavior can have devastating financial and psychological impacts. As one Mexican woman reported:

> "I had to spend four days of my salary on paperwork – including a medical certificate, bloodwork, and a background check. But it was all for nothing. When I went to drop off my papers at the grower's office in San Quintín, the person in charge told me they were only hiring men."[38]

Such negative impacts are not limited to internationally recruited workers. Despite the fact that both H-2A and H-2B regulations prohibit discrimination against U.S. workers,[39] domestic workers are sometimes fired, or not re-hired – due to their race, age, sex, or wage-earning potential – in order to hire internationally recruited workers with characteristics an employer prefers.[40] Thus, H-2 and other visa programs can encourage "homegrown discrimination," which harms both domestic and foreign workers, who alike are cut out of labor markets due to the biases of U.S. employers.[41]

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[35] *See, e.g.*, *La Ley Federal del Trabajo*, arts. 3, 56, 133, 164 (codifying a guarantee of the Mexican Constitution by prohibiting employment discrimination on the basis of race, sex, age, religion, political persuasion, or social condition).

[36] *See* CDM, *Amended Petition*, *supra* note 33, at 6-7 (highlighting the relevance of Articles 23.3(1)(d) [Labor Rights], 23.5(1) and (2) [Enforcement of Labor Laws], and 23.9 [Discrimination in the Workplace] of the USMCA).

[37] *See id.* at 17.

[38] *See* CDM, *Third Supplement to the Petition Regarding Labor Law Matters Arising in the United States* (Mar. 31, 2022), https://cdmigrante.org/wp-content/uploads/2022/03/Third-Complaint-USMCA-Supplement.pdf at 2.

[39] 20 C.F.R. §§ 655.135(a), 655.20(r).

[40] *See* EEOC Press Release, *Hamilton Growers to Pay $500,000 to Settle EEOC Race / National Origin Discrimination Lawsuit* (Dec. 13, 2012), https://www.eeoc.gov/newsroom/hamilton-growers-pay-500000-settle-eeoc-race-national-origin-discrimination-lawsuit; *see also* S. Poverty L. Ctr., *Close to Slavery: Guestworker Programs in the United States* (Feb. 19, 2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf at 32 ("[T]he ability to choose the exact characteristics of a worker (male, age 25-40, Mexican, etc.) is one of the very factors that make guestworker programs attractive to employers.").

[41] *See* Ryan H. Nelson, *Homegrown Discrimination*, 12 CALIF. L. REV. ONLINE 1 (May 2021), https://www.californialawreview.org/homegrown-discrimination.

Relevant Litigation

This section will summarize several key cases relevant to whether federal courts may yet entertain Title VII claims of discriminatory hiring brought by foreign nationals: *Reyes-Gaona v. North Carolina Growers Ass'n*, 250 F.3d 861 (4th Cir. 2001); *Olvera-Morales v. Sterling Onions, Inc.*, 322 F. Supp. 2d 211 (N.D.N.Y. 2004); and *Nakhid v. American University*, No. 19-cv-3268, 2021 U.S. Dist. LEXIS 173805 (D.D.C. Sep. 14, 2021), *aff'd* No. 21-7107, 2022 U.S. App. LEXIS 8954 (D.C. Cir. Apr. 4, 2022).

Reyes-Gaona

Reyes-Gaona held that foreign labor recruiters' disparate treatment abroad is not prohibited by the ADEA, given the presumption against extraterritorial application; the majority was particularly concerned about opening the floodgates to millions of claims of discrimination abroad.[42] This concern may have been based on a misunderstanding of the scope and nature of U.S. work visa programs, and has been criticized as effectively legalizing discrimination precisely where it is abundant.[43]

Reyes-Gaona has been influential beyond the Fourth Circuit. Some courts even view it as having settled any questions around the extraterritorial application of Title VII, even though it was only decided with respect to ADEA claims.[44]

The EEOC filed an *amicus* brief on behalf of petitioners in *Reyes-Gaona*. Despite losing that case, proposed guidance from the EEOC in 2016 stated that the agency still took "the position that foreign nationals outside the United States are covered by [employment] statutes when they apply for U.S.-based employment."[45] The EEOC cited three cases in support of this position (which it since appears to have abandoned, perhaps due to endemic resource constraints at the

[42] *Reyes-Gaona*, 250 F.3d at 866.

[43] *See* RC Waddud, *Allowing Employers to Discriminate in the Hiring Process under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C. J. INT'L L. & COM. REG. 335, 359 (2001) (criticizing the Fourth Circuit for assuming that "1) a foreign national applicant, 2) applying abroad, 3) for a job in the United States" is not covered by the ADEA, without inquiring into the congressional record).

[44] *See, e.g.*, *Reyes-Fuentes v. Shannon Produce Farm, Inc.*, 671 F. Supp. 2d 1365 (2009) (dismissing, in a parallel context, an FLSA suit by Mexican farmworkers); *David v. Signal Int'l LLC*, No. 08-1220, 2013 U.S. Dist. LEXIS 138476 (E.D. La. Sept. 26, 2013) (holding that allegedly discriminatory recruitment fees charged to foreign citizens outside the U.S. were beyond the territorial scope of Title VII).

[45] *See* EEOC, *PROPOSED Enforcement Guidance on National Origin Discrimination* (June 1, 2016), https://www.regulations.gov/document/EEOC-2016-0004-0001. This proposed guidance was never enacted.

agency[46]): *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3d Cir. 1997) (finding that the place where a job is performed constitutes the location of the work site for ADEA coverage purposes); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999) (holding that a non-U.S. citizen was not protected by the ADEA with respect to employment abroad, even though employment interviews and hiring decisions were made in New York); and *Gantchar v. United Airlines, Inc*., No. 93 C 1457, 1995 WL 137053 (N.D. Ill. Mar. 28, 1995) (finding that Title VII jurisdiction is dependent on the location of potential employment).

None of these cases are clear winners for the EEOC's then-position, however. *Hu*, for instance, in part cuts directly against what it was cited to support: "[F]ederal district courts lack subject matter jurisdiction to extraterritorially apply the [ADEA] to prospective employees who are not citizens of the United States."[47] And the other two cases turned on *job situs* theories, which, as discussed above, may no longer pass muster with the Supreme Court's reformulation of the test for extraterritoriality.

In a previous Memorandum for CDM, Yaman Salahi argued, nonetheless, that recent Supreme Court reasoning actually casts *Reyes-Gaona* in a negative light, since the focus of Title VII is domestic employment.[48] By this logic, because prohibitions on discrimination are tied to conditions at U.S. workplaces, then actions taken at the hiring stage, even overseas, fall within the ambit of the statute. I will return to this argument in the penultimate section of this Memorandum.

Olvera-Morales

Olvera-Morales challenged U.S. employers' systematic placing of women in H-2B jobs, which often offer inferior pay and benefits to H-2A jobs, on behalf of several women with a history of being placed in these less desirable positions.[49] The Northern District of New York agreed that Title VII *should* reach these women's claims, and the case settled.[50] Rather than outright disagreeing with the reasoning in *Reyes-Gaona*, however, the court distinguished *Olvera-Morales*

[46] *See* Maryam Jameel, *More and more workplace discrimination cases are being closed before they're even investigated* (June 14, 2019), https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination.
[47] *See Hu*, 76 F. Supp. 2d at 477.
[48] *See, e.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987) (discussing "Title VII's purpose of eliminating the effects of discrimination in the workplace"); *EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96, 102 (2d Cir. 2015) (recognizing that "the purpose behind Title VII" is to "eliminat[e] discrimination in the workplace").
[49] *Olvera-Morales*, 322 F. Supp. 2d at 222.
[50] *Id.* at 221.

by relying on the plaintiff's "extensive contacts" with the United States, including prior employment and work authorization.[51]

Because the putative class in *Olvera-Morales* thus excluded workers without prior contacts in the United States, the court skirted a number of tricky, perennial issues in extraterritoriality litigation. Professor Ryan Nelson, for example, believes that, had the case gone on appeal, the Second Circuit would have quashed the employees' claims for touching on foreign policy concerns.[52] It was also left unsettled whether U.S. employers are immune from Title VII claims stemming from actions their recruiter agents take abroad, or if they carry joint employer liability.[53]

Although beyond the scope of this Memorandum, establishing joint employment with foreign recruiters could be helpful in opening up U.S. employers to Title VII liability.[54] Absent further congressional or administrative guidance on this issue, however, it may be a difficult argument to systematically advance in litigation.[55]

Nahkid

In *Nahkid*, a non-citizen, non-resident of the United States sued American University for not hiring him as their head soccer coach, allegedly due to his race and nationality. In granting summary judgment for the defendant, the D.C. District Court grappled with "whether Title VII applies to a noncitizen applying for employment in the United States when he is physically located outside the United States."[56] They held that it does not.

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[51] *Id.*

[52] *See* Nelson, *supra* note 41. Although Nelson believes such a result would be incorrect because recent Supreme Court jurisprudence suggests that extraterritorial application concerns are most relevant when clear foreign policy objectives or relationships are implicated, I am not so sure. For instance, in *Hernandez*, the dissent points out there was no real foreign policy conflict at play; the Mexican government even petitioned on behalf of plaintiffs. 140 S. Ct. at 758 (Ginsburg, J., dissenting). Nonetheless, the majority insisted that there was a conflict because "Mexico has an interest in exercising sovereignty over its territory and in protecting and obtaining justice for its nationals. It is not our task to arbitrate between [the two countries]." *Id.* at 745.

[53] Title VII further prohibits employment *agencies* from utilizing discriminatory practices. Title VII § 703(b) (42 U.S.C § 2000e–2(b)). But even if foreign labor recruiters are agencies, workers will likely prefer going after the deeper pockets of employers.

[54] *See, e.g.*, *EEOC v. Global Horizons*, 904 F. Supp. 2d 1074 (D. Haw. 2012) (denying a motion to dismiss claims of national origin discrimination by Thai H-2 workers recruited abroad, without reaching concerns about the extraterritorial application of Title VII).

[55] *See* Elanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J. L. & SOC. PROBS. 399, 442-45 (2010) (arguing that to impose full liability on U.S. employers for illegal foreign recruitment fees, policy and statutory changes is necessary). For discussion of other practical difficulties that may arise in pushing shared liability via agency theories, *see generally* Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 491-95 (2017).

[56] *See Nahkid*, 2021 U.S. Dist. LEXIS 173805, at *10.

Key in the court's reasoning were the 1991 amendments to Title VII, which failed to include clear statutory language covering cases like *Nahkid*: Ultimately, "[t]he question is not whether [a court] think[s] 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the statute will do so."[57]

In a semi-application of the second step of the *Morrison-Nabisco* analysis, the court also considered whether Title VII's domestic focus should outweigh concerns about extraterritorial application. It agreed that the statute's substantive purpose is eliminating discriminatory behavior by employers, but that this is not dispositive vis-a-vis the question of whether the employer's behavior is the "relevant conduct" for analysis.[58] Instead, the court engaged in a convoluted analysis to distinguish the *conduct* a statute seeks to regulate from "the parties and *interests* it 'seeks to protect or vindicate.'"[59] Thus, the rights of U.S.-based employees and U.S. citizens working abroad constituted the prevailing domestic interest of Title VII, not the "interests of a noncitizen."[60]

The D.C. Court of Appeals, while accepting the result below, held that it "need not consider whether Title VII . . . [applies to] job candidates who are not U.S. citizens and who apply to U.S.-based jobs while physically located outside the United States."[61] That is, the plaintiff's argument on the merits was weak enough (he was one of 100 applicants for the position, was not particularly qualified for the role, and other Black men made it further in the hiring process than he did), that it was not necessary for the appellate court to accept the district court's reasoning on the extraterritorial application of Title VII.[62]

These facts, of course, present quite a different situation than, say, women being preemptively shut out of an H-2A hiring process. Yet for this and other distinctions, the first opinion in *Nahkid* is largely contiguous with the cases above. To wit, the district court echoed the floodgates concern in *Reyes-Gaona*, evincing hesitation about protecting the interests of "foreign nationals who merely submit an application for a job in the United States from abroad."[63]

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[57] *Id.* at *12 (quoting *Nabisco*, 579 U.S. at 335).
[58] *Id.* at *16.
[59] *See id.* at *17 (quoting *WesternGeco*, 138 S. Ct. at 2137) (emphasis added).
[60] *Id.* at *18.
[61] *See Nahkid*, No. 1:19-cv-03268, slip op. at 3 (D.C. Cir. July 12, 2022).
[62] *See id.* at 1.
[63] *See Nahkid*, 2021 U.S. Dist. LEXIS 173805, at *18.

Therefore, future litigation on behalf of plaintiffs fitting that description would likely need to push for something of a paradigm shift in how federal courts approach these types of claims.

Hurdles and Opportunities

In previous eras, internationally recruited workers would have had an easier time arguing that Title VII and other federal employment statutes should apply to their claims. Under the effects test, for instance, it would be plausible to argue that widespread discrimination abroad for U.S. jobs harms U.S. workers – and the U.S. economy – by disrupting domestic labor markets.[64] And if *job situs* theories were still in play, claims of discrimination impacting exclusively U.S. worksites should be colorable, too.[65] But instead, the prevailing *Morrison-Nabisco* test requires both a) that discriminatory conduct took place in the United States[66] and b) that the impact of this behavior is relevant to Title VII's focus.

Ideal Facts

To satisfy criterion (a), it is crucial that any litigation not focus predominantly on the discriminatory actions of a foreign labor recruiter. The best-case scenario here would be evidence of a U.S. employer explicitly directing their agent, a foreign recruiter, to only hire, for instance, male workers. Failing that, it would be helpful to develop a record that takes an employer "to task for unjustifiably sticking their heads in the sand whilst their agents discriminate abroad."[67] For instance, CDM has compiled several explicitly discriminatory H-2 job advertisements, of which it could be possible to prove a U.S. employer had actual or constructive knowledge.[68] But, as the *Morrison* court made clear, the place of a discriminatory decision is not the only relevant factor.[69]

Criterion (b) is notably more difficult to satisfy. Though it did not produce binding precedent, the district court in *Nahkid* found a way to conclude, however fragilely, that the "focus"

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[64] *See* Born, *supra* note 3.

[65] This is not to say they would be successful, of course. *See, e.g.*, *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021) (finding that the relevant focus of the Alien Tort Statute wasn't a domestic corporate decision to allow child slavery but the actual use of child slavery in Ivory Coast).

[66] See *Nabisco*, 579 U.S. at 337 ("[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.").

[67] *See* Nelson, *supra* note 41.

[68] *See* CDM, *Third Supplement*, *supra* note 38, at 5-8.

[69] *See* Dodge, *supra* note 2, at 1585 ("*Morrison* abandoned the presumption's traditional dependence on the location of the conduct."). For an example of how much easier it may be to succeed in a case where the only relevant inquiry is the location of the prohibited conduct, *see Env't Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) ("Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.").

of Title VII is the interests of U.S.-based workers and U.S. citizens working abroad.[70] Therefore, an ideal plaintiff, as in *Olvera-Morales*, would be someone who already worked for a U.S. employer but is rejected for a more desirable visa job with that employer in a subsequent year, after applying from their home country. However, a more impactful version of *Olvera-Morales* might yet have the perverse effect of locking out first-time visa seekers from pursuing discrimination claims.

Due to the stakes of this potential litigation, then, it would be advisable to at least get the EEOC on board again – along with, ideally, the Department of Labor (DOL) – with the idea that the focus of Title VII encompasses anyone seeking employment in the United States. To Mr. Salahi's argument referenced above, this likely will be possible in at least some jurisdictions given the flexibility with which courts interpret the question of what constitutes a statute's focus.[71] Further inquiry into the congressional record of Title VII and its amendments may also be enlightening on this point, although it is a statute with a famously convoluted legislative history.[72]

Further Difficulties

Even if all of the above goes well, however, there is yet another huge hurdle to overcome: textualism. Despite the Supreme Court holding out that extraterritorial application no longer turns on a "clear statement rule" and that "context can be consulted" in the congressional record, it is easy to imagine that an extraterritorial Title VII case on appeal before a conservative federal judiciary would stumble on the grounds that Congress has not explicitly accounted for a given fact pattern.[73]

There is also the inescapable, if ambiguous, threat of foreign policy concerns that animate the reasoning of much of the Supreme Court's recent international law jurisprudence.[74] At least with respect to workers from Mexico, then, it would be helpful to rely on provisions from the USMCA obliging the United States and Mexico to mutually enforce their (again, substantially

[70] An implicit tenet of *Olvera-Morales* is that this focus extends to workers not currently in the U.S. but with prior employment connections there.

[71] *See* Gevurtz, *supra* note 4, at 456-61 (noting that the Supreme Court's cases applying the focus test are divided on whether the location matters more than the impact of a given action [*Morrison*; *WesternGeco*], or if the exact opposite is true [*Nabisco; Kiobel*]). Lower courts posing the same inquiry appear just as diverse in their analyses. *See, e.g.*, *Mastafa*, 770 F.3d at 184-85, 187 (blending the standards from *Morrison* and *Kiobel*).

[72] *See, e.g.*, Caroline Fredrickson, *How the Most Important U.S. Civil Rights Law Came to Include Women*, 43 N.Y.U. REV. L. & SOC. CHANGE 122 (2019) (recounting how Title VII came to protect against sex discrimination due to a fortuitous alliance between the National Women's Party and a segregationist southern congressman).

[73] *See* Dodge, *supra* note 2, at 1585; *see also generally* Born, *supra* note 3.

[74] *See Hernandez*, 140 S. Ct.

similar) labor and employment laws consistently throughout North America.[75] But it is far from clear that an international agreement, even one approved by Congress, would have much sway in the eyes of domestic courts.

Alternate Pathways

For the reasons above, it would be reasonable for CDM to conclude that the time is not ripe to pursue an extension of Title VII abroad, the moral merits of the impulse notwithstanding. This does not mean, however, that there are no fruitful ways to challenge endemic discrimination in temporary work visa programs via litigation.

A number of these possibilities were sketched out by Professor Jennifer Lee in a previous Memorandum for CDM. One of these ideas, referenced above, would be to push agency theories, arguing that U.S. employers are either joint employers with their foreign labor recruiters, or otherwise vicariously liable for actions taken abroad on their behalf.[76] Professor Lee also notes that, in addition to prohibiting discrimination against U.S. workers, both the H-2A and H-2B regulations require that the introduction of H-2 visa workers not adversely affect the wages or working conditions of U.S. workers.[77] It is thought, nonetheless, that the DOL does not seriously consider these requirements when approving H-2 positions,[78] and, at any rate, the United States and Mexico appear poised to dramatically increase the scope of temporary work visa programs.[79]

Still, might this suggest a way to bring a version of an effects test into litigation at the intersection of extraterritorial discrimination and the H-2 programs? There could, for example, be a case brought on behalf of U.S. women agricultural workers shut out of local jobs in favor of foreign male workers. Similar claims could be advanced under the ADEA or ADA on behalf of, respectively, older or disabled domestic workers. Such an idea deserves deeper development and

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[75] *See* CDM, *Amended Petition*, *supra* note 33, at 5-7.

[76] *See, e.g.*, *Global Horizons*, 904 F. Supp. 2d (finding extraterritoriality concerns far from insurmountable when there is a close tie between domestic decisions and subsequent foreign discriminatory conduct).

[77] 20 C.F.R. §§ 655.100(b), 655.1(a)(2).

[78] *See* Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (May 2012), https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf at 7-8 (finding that the DOL fails to prevent temporary work visas from driving down wages and approves positions from employers who violate H-2 program regulations and other U.S. laws). Even when they abuse the H-2 program and are found out, powerful U.S. employers can find a way to continue hiring foreign workers into exploitative environments. *See* Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, *The Pied Piper of North Carolina* (Dec. 29, 2015), https://www.buzzfeednews.com/article/kenbensinger/the-coyote.

[79] *See* Aristegui Noticias, *EU aceptó aumentar "considerablemente" visas trabajo para mexicanos y centroamericanos, asegura AMLO* (July 14, 2022), https://aristeguinoticias.com/1407/mexico/eu-acepto-aumentar-considerablemente-visas-trabajo-para-mexicanos-y-centroamericanos-asegura-amlo/.

scrutiny, however, especially as it conceivably pits the interests of marginalized groups against one another.[80]

Finally, individual cases like *Olvera-Morales* brought through the EEOC's administrative claim process – and into court, when necessary – may still be successful in gaining relief for women excluded from their preferred jobs or paid less than their male colleagues once in the United States. Plaintiffs' counsel should be wary, however, to not invite further precedent excluding those who have not yet worked in the United States from joining such actions.

Conclusion

Temporary work programs such as H-2A and H-2B present something of a judicial and administrative paradox. On the one hand, they are large enough to have notable impacts on labor markets in agriculture and other industries across the United States. Thus, one might expect U.S. federal agencies and courts to be concerned with whether the government is allowing rampant discrimination throughout the course of these programs, harming not only internationally recruited workers but also domestic workers who are excluded from jobs. On the other hand, the very scale of these programs – which appears set to increase further still – makes agencies and courts wary of opening their already-strained dockets to claims of discrimination from foreigners, however otherwise meritorious. Political and legal advocacy from CDM and others may yet convince institutional actors to weigh the former concern more heavily than the latter, but it is not clear how, in the current jurisprudential context, to do so in one fell swoop. Therefore, this Memorandum recommends exploring a variety of complementary approaches: expanding on limited victories such as *Olvera-Morales*; pushing for more expansive interpretations, utilizing agency doctrine, of Title VII's imposition of liability on U.S. employers for their discriminatory foreign recruitment practices; and centering the interests of U.S. workers in impact cases to avoid altogether the ever-evolving presumption against extraterritoriality.

[80] Such an approach also brings to mind "creative" litigation sometimes brought under Title VII and other civil rights statutes on behalf of relatively privileged groups. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (holding that New Haven violated Title VII and discriminated against white firefighters in throwing out a test that favored them for promotion).

Applicant Details

First Name	**Ecclesiaste**
Last Name	**Desir**
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Address	**Address** Street **4404 Foster Avenue** City **Brooklyn** State/Territory **New York** Zip **11203** Country **United States**
Contact Phone Number	**7742086784**

Applicant Education

BA/BS From	**Howard University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Moot Court Competition** **NBLSA Thurgood Marshall Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Lee, Sophia
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ecclesiaste Ginord Desir

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June 1, 2023

The Honorable Judge Beth Robinson
Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT, 05401

Dear Judge Beth Robinson,

As a rising third-year law student at the University of Pennsylvania Law School, I am writing to express my interest in the clerkship opportunity currently available and any future positions that may become available. My passion for building a more equitable justice system motivated me to pursue a legal career, and I believe that my skills and qualifications align with the requirements of this role.

Prior to law school, I worked in Executive Search for two years, where I developed exceptional time management and interpersonal skills. During my first two summers of law school, I worked as a capital market summer associate at Greenberg Traurig, where I focused on securities regulation issues. Currently, I am a litigation summer associate at Skadden, Arps, Slate, Meagher & Flom, where I work on matters relating to corporate criminal liability, antitrust, contract, corporate, and securities law.

In addition to my legal experience, I have also enhanced my writing and editing skills through my role as **Editor-in-Chief** of the *University of Pennsylvania Law Review*. My research and writing expertise led me to a deeper understanding of federal justiciability and constitutional litigation, as evidenced by my comment submitted for publication in the *Law Review*. As **President** of Penn Law's Black Law Students Association (BLSA), I developed management and advocacy skills, advocated for advancing equity, and successfully lobbied for the creation of five full-tuition scholarships to be awarded to incoming first-year students whose education, experience, and professional commitments advanced racial justice. As a teaching assistant, I crafted comprehensive multiple-choice questions that effectively tested students' understanding and critical thinking skills. Additionally, I meticulously prepared class notes, ensuring that each lecture was well-documented and easily accessible to students.

Although I had many responsibilities, I also had a full schedule of courses. I have studied Constitutional Litigation (a Federal Court equivalent), Administrative Law, Judicial Decision Making, Antitrust, Evidence, Conflicts of Law, and Appellate Advocacy - an advanced legal writing course. In the upcoming year, I plan to take Federal Courts, Constitutional Criminal Procedure, and Employment Law.

I believe that working alongside you as a law clerk will provide me with invaluable insights into the court's operations and help me refine my skills as a legal advocate. I am committed to conducting thorough research and analysis to support the court's crucial work, and I look forward to learning from your guidance and expertise.

Accordingly, please find enclosed my resume, transcript, writing sample, and letters of recommendation from Professor Sophia Lee (slee@law.upenn.edu), The Honorable Anthony Scirica (ascirica@ca3.uscourts.gov), and Professor Robert Zauzmer (bob.zauzmer@usdoj.gov). Thank you for considering my application, and please do not hesitate to let me know if you require any additional information from me.

Respectfully,
Ecclesiaste Desir
Editor-in-Chief, Vol. 172, *University of Pennsylvania Law Review*
Candidate of Juris Doctor 2024

ECCLESIASTE GINORD DESIR

(774) 208-6784 |edesir@pennlaw.upenn.edu|4404 Foster Avenue, Brooklyn, NY, 11203

EDUCATION

University of Pennsylvania Law School, Philadelphia, PA **May 2024**
Juris Doctor Candidate
Activities: *President*, Black Student Law Association; Member, Penn Law BLSA Moot Court Team
Honors: Editor in Chief, Vol. 172, *University of Pennsylvania Law Review*; Associate Editor, Vol. 171, *University of Pennsylvania Law Review*

Howard University, Washington, D.C. **May 2019**
Bachelor of Arts, *summa cum laude*, in Political Science with a History minor
Cumulative GPA: 4.0
Activities: Howard University Blockchain Labs, **Co-founder**; WHBC 96.3 Radio System, Radio Personality
Awards: ETS Presidential Scholarship

Milton Academy, Milton, MA **2011 – 2015**

Prep for Prep, New York, NY **2010 – Present**
A highly selective leadership development program that incorporates a rigorous 14-month academic component to prepare students for placement in leading independent schools and works closely with them through high school and beyond.

EXPERIENCE

Skadden Arps, Slate Meagher & Flom LLP, New York, NY **May 2023 – July 2023**
Summer Associate

Greenberg Traurig, Fort Lauderdale, FL **May 2022 – July 2022**
LCLD Summer Associate (Capital Markets, Inaugural 1L Associate for the Capital Markets practice)
- Drafted Post Effective Amendments for S-1 to S-3 SEC Forms.
- Drafted Form 8-ks as a response to 8-K triggering events.
- Prepared and reviewed S-1s and S-8s.
- Prepared Registration Rights Agreements for PIPEs.
- Drafted and reviewed Corporate Governance Guidelines.
- Created client Annual Meeting Documents (e.g., meeting scripts, board resolutions, minutes documents, etc.).

Egon Zehnder, Dallas, TX **February 2021 – August 2021**
Business Analyst
- Partnered with experts and consultants on client mandates, projects, pitch preparation, and knowledge management.
- Monitored and tracked relevant market developments in a segment, including company updates and new hires.
- Created high-quality client documentation (e.g., candidate profiles, role specifications, company mappings, etc.).
- Identified, calibrated on, and prioritized potential candidates through the firm network, market research, and research resources.
- Conducted market research to shape the approach to search and develop a list of target companies.

Korn Ferry, Dallas, TX **January 2020 – February 2021**
Associate Recruiter
- Defined, designed, and implemented the sourcing strategy for building talent pools of specific candidate profiles.
- Consulted clients to clearly define and develop a compelling employee value proposition and incorporate this information into the sourcing strategy framework.
- Developed effective candidate relationship management strategies to sustain strong working relationships with potential candidates.

Interests and Languages

Language: Fluent in Haitian Creole
Interest: History: Classical Antiquity; Cinema (Thrillers, Coming-of-age); Weightlifting and Cardio.

Record of: Ecclesiaste G Desir
Penn ID: 53899228
Date of Birth: 01-JAN
Date Issued: 05-JUN-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
INSTITUTION CREDIT:					
Fall 2021					
Law					
LAW	500	Civil Procedure (Wolff) - Sec 1	4.00	B+	
LAW	502	Contracts (Galbraith) - Sec 1	4.00	B	
LAW	504	Torts (Klick) - Sec 1B	4.00	B	
LAW	510	Legal Practice Skills (Edwards)	4.00	CR	
LAW	512	Legal Practice Skills Cohort (Vidyarthi)	0.00	CR	
Ehrs: 16.00					
Spring 2022					
Law					
LAW	501	Constitutional Law (Shanor) - Sec 1	4.00	B	
LAW	503	Criminal Law (Ferzan) - Sec 1B	4.00	B+	
LAW	510	Legal Practice Skills (Edwards)	2.00	CR	
LAW	512	Legal Practice Skills Cohort (Vidyarthi)	0.00	CR	
LAW	583	Judicial Decision-Making (Scirica)	3.00	A-	
LAW	601	Administrative Law - 1l (Lee)	3.00	A-	
Ehrs: 16.00					
Fall 2022					
Law					
********** CONTINUED ON NEXT COLUMN **********					

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	6070	Antitrust (Hovenkamp)	3.00	B	
LAW	6120	Appellate Advocacy (Zauzmer)	3.00	A	
LAW	6170	Conflict of Laws (Roosevelt)	3.00	B	
LAW	6740	Constitutional Litigation (Kreimer)	4.00	A-	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
Ehrs: 13.00					
Spring 2023					
Law					
LAW	6310	Evidence (Rudovsky)	4.00	B+	
LAW	7430	Complex Litigation (Scirica/Duncan)	3.00	B	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
LAW	8130	Appellate Advocacy Preliminary Competiton (Gowen)	1.00	CR	
LAW	9990	Independent Study (Lee)	3.00	A-	I
LAW	9990	Teaching Assistant (Lee)	2.00	CR	I
Ehrs: 13.00					

********** TRANSCRIPT TOTALS **********

	Earned Hrs
TOTAL INSTITUTION	58.00
TOTAL TRANSFER	0.00
OVERALL	58.00

********** END OF TRANSCRIPT **********

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Clerkship Applicant Ecclesiaste Desir

Dear Judge Robinson:

Ecclesiaste Desir is a talented legal writer and thinker who inspires great confidence. He has excelled in some of the law school's hardest classes and demonstrated excellent legal writing. Mature beyond his years, his peers look to him as a leader. He will be an able and committed clerk who will bring steadiness and a strong work ethic to the position. I recommend him to you for a clerkship with great enthusiasm.

Ecclesiaste is a strong legal writer and able legal analyst. Administrative Law is a challenging class, particularly for first-year students. Despite those challenges—and a strictly enforced curve—Ecclesiaste earned a high A- in the class. I design my Administrative Law exam to mirror real world assignments: it is a word-limited, 24-hour take home. To do well requires not only spotting and analyzing issues well, but also excellent writing and sound judgment as to which issues to focus on and at what depth. Ecclesiaste demonstrated all these qualities, spotting every issue and providing strong analyses across the board as well as earning my highest marks on several. He even earned extra points for the high quality of his legal writing. Based on his exam, I would expect him to handle well the writing and analytic demands of a clerkship.

Ecclesiaste is a versatile as well as strong writer. In addition to an issue spotter, my Admin exam required students to write a short argumentative essay. Ecclesiaste had to analyze the Supreme Court's recent separation of powers decisions, including the presidential removal powers cases culminating in Collins v. Yellen and the non-delegation arguments in Gundy. Ecclesiaste wrote an excellent essay, earning my highest marks. I am now supervising the writing of his student comment for our Law Review. He is analyzing how the Roberts Court has mobilized efficiency arguments to limit Section 1983 litigation. While I have only seen his proposal and outline thus far, I have been impressed with his strong, clear writing. He has also shown excellent initiative, solid research skills, and outstanding organization. I've been impressed as well with his openness and responsiveness to feedback. He has the strong and versatile writing as well as the work ethic a clerkship requires.

Ecclesiaste is also quick on his feet and a strong communicator. He earned my highest marks when cold called in Administrative Law. He was judicious with his voluntary participation in class but every time he spoke, his contributions were high quality, also earning my highest marks. I was impressed with his effective use of office hours the several times he attended. He listened carefully and, as in class, made efficient and effective use of his questions. Based on his strong performance in Administrative Law, I invited Ecclesiaste to serve as a teaching assistant in Administrative Law this year. He has been a responsive and responsible TA, collaborating well with his co-TAs and impressing me with his high level of professionalism.

Ecclesiaste can rise to a challenge. A summa cum laude graduate of Howard University, he has done the best in law school in some of its hardest classes. My colleagues at other law schools are surprised we teach Admin as a first-year course, given its difficulty, yet Ecclesiaste performed excellently. He also did very well in Constitutional Litigation, a class that is beloved by our students but notorious for its heavy workload and, given its overlap with Federal Courts, difficult material.

Ecclesiaste is a natural leader who inspires great confidence. Ecclesiaste's peers selected him to serve as Editor-in-Chief of the University of Pennsylvania Law Review, a tremendous honor. He has also served this year as President of the Black Law Students Association. To meet Ecclesiaste is to understand why his peers have such faith in him: he has impressive poise, projects quiet strength, and conveys reassuring calmness. He will inspire similar confidence and be a steadying presence in Chambers.

Ecclesiaste is also lovely. A Brooklyn native and the middle child in a family of five, he has a good-natured unflappability and warm smile that can set people at ease. He has the tested character of a former competitive wrestler and the infectious enthusiasm of an avid sports fan (for him, the New York Knicks and Giants). He is intellectually curious and speaks enthusiastically about tackling a knotty legal issue.

Ecclesiaste is a talented legal writer and analyst with the judgment, work ethic, and organizational skills a clerkship demands. Mature, even keeled, and steadfast, he will be a welcome addition to Chambers. Excited for the growth a clerkship will produce, he will be a delight to mentor. I recommend him to you for a clerkship with great enthusiasm.

Sincerely,

Sophia Z. Lee
Professor of Law
Tel.: (215) 573-7790
E-mail: slee@law.upenn.edu

ROBERT A. ZAUZMER
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June 12, 2023

The Honorable Beth Robinson
Federal Building
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Burlington, VT 05401

Re: Clerkship Applicant Ecclesiaste Desir

Dear Judge Robinson:

I am pleased to recommend Ecclesiaste ("Clay") Desir for a judicial clerkship.

I am an Assistant United States Attorney in Philadelphia. I have served as a federal prosecutor for 33 years, and have served during the past 25 years as the chief appellate attorney for the office. In addition, I served a one-year detail in 2016 as the Pardon Attorney in the Department of Justice in Washington, DC, overseeing the completion of President Obama's clemency initiative.

I also teach a fall seminar on appellate advocacy at the University of Pennsylvania Carey Law School. In that capacity, I met Clay, who was one of my students in the seminar during the fall of 2022. Clay earned an A mark in a very competitive group, and impressed me throughout the semester.

The course at the law school presented oral and written assignments principally related to three cases, two civil and one criminal. One matter involved a motion to certify for interlocutory appeal a district court's order denying summary judgment in a civil rights matter. Another was a government appeal of a district court ruling granting the suppression of evidence in a criminal prosecution, in which the students fully briefed and argued the case in a moot court setting. The third case presented a complex question of habeas jurisdiction, centered on whether a defendant's latest filing was properly dismissed as a successive motion instead of being treated as a motion for reconsideration of an earlier ruling. This matter was an actual appeal pending before the United States Court of Appeals for the Third Circuit, and I assigned the students, in advance of the argument before the Court of Appeals, to prepare a bench memo identifying the key issues and contentions in the appeal, and suggesting the appropriate outcome.

Clay did well in both the written and oral advocacy portions of the class. What most impressed me is his determination, sincerity, and humility. He was already a good writer when the class began, but he repeatedly expressed to me his desire to become even better, and gather all advice he could to advance that goal. Sure enough, he took all recommendations to heart, and made evident improvement as the class progressed. He writes with a distinctive, colloquial voice, that can be very engaging when presenting sometimes-dry legal material.

Clay's efforts in the oral advocacy portion of the course were also impressive. I appreciate that oral advocacy is not part of a clerk's responsibility, but I believe it is notable that Clay demonstrated skills that are pertinent to a clerk's role. He is very effective at presenting his views orally, in a clear and compelling fashion. I described his lengthy oral argument at the conclusion of the class as "exceptional," as he combined a comfortable and persuasive speaking style with mastery of the relevant material.

I must add that Clay appears to me to be a natural leader, whose intelligence and personality are most compelling. I am not surprised that he has achieved leadership positions at Penn and throughout his legal career, and I told him that I look forward to seeing him in important positions of community leadership in the future.

For all of these reasons, I believe that Clay will be an able judicial clerk and later an excellent attorney and public leader. Please let me know if I may be of further assistance in the consideration of his application.

Respectfully yours,

/s Robert A. Zauzmer
ROBERT A. ZAUZMER

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Clerkship Applicant Ecclesiaste Desir

Dear Judge Robinson:

I am delighted to write a letter of recommendation on behalf of Ecclesiaste Desir, a student at the University of Pennsylvania Carey Law School, who has applied for a clerkship in your chambers. Ecclesiaste (or Clay) is on his way to compiling a superb record at Penn Law School. He has just been selected Editor-in-Chief of the University of Pennsylvania Law Review.

I know Clay well, having taught or co-taught him in two courses at Penn Law School: Judicial Decisionmaking in his first year and Complex Litigation this Spring. In both classes Clay was superbly prepared and enjoyed engaging the most difficult issues with intelligence and insight. In both classes, he asked penetrating questions and gave thoughtful responses.

In the 1L course on Judicial Decisionmaking, Clay wrote an excellent examination demonstrating his understanding of the legal and policy implications of the course material. His examination was superbly written – clear, well-structured, and thoughtful. I gave him the grade of A-.

In the course on Complex Litigation, we delved into the world of complex litigation – joinder, MDL, class actions, mass aggregation and bankruptcy. In this class, Clay was well prepared and was a frequent participant asking good questions and giving good responses.

Clay is a wonderful young man, intelligent, perceptive, mature, self-directed, and hard working. He has an engaging personality and is a natural leader. Clay has been a frequent visitor in office hours, and I have enjoyed getting to know him. Clay is always curious, positive, and optimistic. He is liked and admired by all who know him and would fit well in chambers.

I believe Clay will be an excellent law clerk and am pleased to recommend him most highly.

Thank you for your consideration.

Sincerely,

Anthony J. Scirica
Tel: 215-597-2399

Ecclesiaste Ginord Desir

4233 Chestnut St, Philadelphia, PA 19104

774.208.6784 | edesir@pennlaw.upenn.edu | LinkedIn

Overview of Writing Sample:

The following document serves as a summary of a bench memo created for a case involving Darnell Doss, who is challenging a ruling by the United States District Court for the Middle District of Pennsylvania that favored the United States. The case revolves around whether a pro se post-habeas submission can be considered a Rule 60(b) motion if it challenges procedural deficiencies in a previous habeas proceeding.

The bench memo begins by providing an overview of the case, summarizing Doss's previous pro se habeas proceeding and his subsequent letter to the district court, which raised new arguments based on procedural deficiencies. The memo then outlines the legal questions that both the appellant and appellee face in this case, including matters related to the scope of Rule 60(b) relief, the standard of review, and the district court's jurisdiction over the case.

Next, the memo discusses the relevant legal standards and precedents for interpreting Rule 60(b) motions, including whether pro se submissions challenging procedural deficiencies in a prior habeas proceeding should be treated differently from other Rule 60(b) motions. The memo analyzes the potential procedural and jurisdictional hurdles raised by the government's argument that the district court lacked jurisdiction over the pro se submission as a Rule 60(b) motion.

Finally, the memo concludes by summarizing the legal and factual issues at play in the case and offering recommendations for how the court might resolve the issue of whether a pro se post-habeas submission challenging procedural deficiencies in a prior habeas proceeding should be classified as a Rule 60(b) motion. Overall, the bench memo aims to provide a comprehensive analysis of the legal issues in this complex case.

It is worth noting that the bench memo was an assignment for my Appellate Advocacy class, and I only received generalized feedback for the assignment. The changes did not provide in-line or organizational edits.

MEMORANDUM

To: Professor Zauzmer

From: Ecclesiaste Desir

Date: October 11, 2021

Subject: *Doss v. U.S.*

INTRODUCTION

Darnell Doss is appealing a decision in favor of the United States made by the United States District Court for the Middle District of Pennsylvania. The core issue is whether a pro se post-habeas submission can be treated as a Rule 60(b) motion if it challenges procedural deficiencies in a prior habeas proceeding. Doss argues that it should, while the Government asserts that the district court lacked jurisdiction to consider Doss's January 2020 letter as a motion to reopen under Rule 60(b).

To grasp the context of this case, we must examine Doss's prior pro se habeas proceeding. There, Doss raised claims of ineffective assistance of counsel and violations of due process in his challenge of a drug-related conviction. Yet the district court rejected all his arguments, and the Third Circuit upheld that decision.

Later, in January 2020, Doss submitted a letter to the district court that proposed new arguments based on alleged procedural deficiencies in his earlier habeas proceeding. The district court construed this letter as a Rule 60(b) motion to reopen. The court ultimately rejected Doss's contentions, stating that he had not established any procedural errors in the previous proceeding.

The central issue on appeal is whether a pro se post-habeas submission that challenges procedural deficiencies in a previous habeas proceeding should be treated as a Rule 60(b) motion. Doss maintains that it should, while the Government argues that Rule 60(b) only applies to procedural errors in the habeas context. The resolution of this issue depends on the interpretation of relevant legal standards, which we will explore in later sections.

QUESTION PRESENTED

For a district court, in the habeas context, to have jurisdiction to consider a motion to reopen under Rule 60(b), the claim must address a procedural error. Doss's claim compelled the district court to invoke the Strickland analytical framework and an analysis of the applicable law—a substantive analysis. So does the district court lack jurisdiction to consider a motion to reopen under Rule 60(b) in the habeas context?

FACTUAL BACKGROUND

On March 15, 2017, Darnell Doss was convicted of a single count of distribution and possession with intent to distribute cocaine based in violation of 21 U.S.C § 841(a)(1).[1] In response, Doss provided the government with a guilty plea agreement – finalizing his conviction.[2] The guilty plea agreement contained a direct appeal waiver, not a collateral attack waiver.[3] After Doss signed the plea agreement, the court sentenced him.

The district court sentenced Doss to 151 months in prison as he signed a plea agreement with a direct appeal waiver and collateral attack waiver.[4] Doss did not file a direct appeal of his conviction or sentence to the court after his sentencing. He requested that Mr. Yaninek file a notice of appeal on his behalf, but Yaninek failed to do it. As a result of this failure, Doss requested that the district court provide him leave to appeal "*nunc pro tunc*."[5]

On July 27, 2015, Doss wrote a letter to the district court requesting copies of several documents.[6] The day after the district court received the letter, it found Doss's letter as a motion to extend the time for filing a notice of appeal.[7] But the district court denied the motion as the deadline for granting extensions expired.[8] In March 2016, Doss, in response to the denial, filed his first collateral attack on his sentence and conviction—a 28 U.S.C § 2255 motion.[9] He asserted

[1] Judgment, Appx71
[2] Plea Agreement, Appx. 46.
[3] Id.
[4] Appx. 72.
[5] July 27, 2020, Appx. 78.
[6] July 27, 2020, letter, Appx.78
[7] Order, Appx. 82.
[8] Id.
[9] Motion, Appx. 90.

in his motion that he received ineffective assistance of counsel based on four claims. The most relevant claim: prior counsel failed to file a notice of appeal.[10]

So after Doss's motion and the government's response, the district court noted that Doss's plea agreement contained a direct appeal waiver, not a collateral attack waiver. So the district court examined whether Doss's counsel provided ineffective assistance of counsel.[11] The Court used the *Strickland* analytical framework to determine this issue.[12] And the court found that Doss's counsel provided effective assistance to him as to file a direct appeal would breach his signed plea agreement.[13] After the district court's finding, Doss attempted to appeal the decision, but it was denied.[14]

With no other form of recourse after this denial of certification, Doss waited eleven months after the *Garza* decision to send a letter to the district court.[15] He requested the district instruct him on how to proceed and "re-state" his appeal.[16] And the district court responded that his letter was a second or successive § 2255 motion that the appellate Court must authorize.[17]

DISCUSSION

Doss, the appellant, argued that the court should follow the Fifth and Eleventh Circuits in holding that denying a habeas petition is a procedural ruling subject to challenge under Rule 60(b).[18] According to the Fifth and Eleventh Circuit holdings, a habeas petition is considered a procedural ruling because it turns on the validity and effect of an appellate waiver in a plea agreement.[19]

In this case, Doss applies the *Garza v. Idaho* ruling. Doss cites that *Garza* supports the Fifth and Eleventh holdings as it characterizes waivers as "procedural devices," incapable of "serv[ing] as an absolute bar to all appellate claims."[20] In other words, *Garza* suggests that issues

[10] Id. at 93, 102-03.
[11] Memorandum, Appx5-13.
[12] Id.
[13] Id.
[14] Id.
[15] January 22, 2020, Letter, Appx. 35.
[16] Id.
[17] Order, Appx. 40.
[18] See Webb v. Davis, 940 F.2d 892, 898-99 (5th Cir. 2019); Pease v. United States, 768 F. App'x 974, 976 (11th Cir. 2019).
[19] Id.
[20] 139 S. Ct. 738, 744-45, 750

about waivers are procedural errors, not substantive ones. Doss further argues that *Garza* applies here as the district court denied his initial habeas petition based on his waiver application. *Garza* held that an ineffective counsel presumption does apply when there is a failure to file a requested notice of appeal, no matter if the signed plea agreement contained an appeal waiver.[21] Doss then concludes his argument by informing the court that it possesses the jurisdiction to construe Doss's January 2020 Letter as a Rule 60(b) motion, revisit its holding on Doss's initial petition, and reevaluate his waiver application properness. But the Appellee, the Government, thwarts many of Doss's points.

The Government presents a well-crafted argument to combat Doss's. The Government contends *Gonzalez v. Crosby* held that district courts might only use Rule 60(b) as a mechanism to reevaluate a prior collateral ruling when the claim exists as a procedural issue, not a substantive one.[22] And *Gonzalez* further holds that the district court must treat substantive claims as second or successive petitions.[23] The Government, therefore, contends that *Gonzalez* applies here as the district court recognized the existence of a valid direct appeal waiver in Doss's plea agreement and treated that as an essential fact bearing on the ineffective assistance of counsel analysis. But the district court did not apply the waiver in any way that would bar it from examining Doss's substantive ineffectiveness claims "on the merits." The district court did, however, apply the *Strickland* analytical framework and an applicable law analysis to Doss's claim.

Applying these two analyses suggests that the district court's holding relied on the substantiveness of Doss's claim and not any procedural errors that arose from it. So the claims exist as a procedural issue, not a substantive one; the district court then lacks any jurisdiction to consider a motion to reopen under Rule 60(b) in the habeas context.

Ultimately, the district court lacks the jurisdiction to consider a motion to reopen under Rule 60(b) as the district court applied the *Strickland* analytical framework and an analysis of the law that applies to Doss's claim. Those analyses rendered the claim as a substantive one. The district court treats a substantive claim as a second or successive § 2255 petition. So the district court cannot consider Doss's claim as a Rule 60(b) motion.

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[21] Id. at 749.
[22] 545 U.S. 524
[23] Id.

Did the District Court "Apply" the Appeal Waiver Contained in His Plea Agreement in Any Procedural Way to Bar His Motion?

A post-habeas petition is a legal process where a defendant who has already been found guilty and exhausted their direct appeal attempts to challenge their conviction or sentence. Post-conviction relief can be sought under 28 U.S.C. § 2255. The Third Circuit has held that a defendant may file a second or successive § 2255 motion only if they have obtained certification from the appropriate court of appeals that the motion contains newly discovered evidence or a new rule of constitutional law, made retroactive by the Supreme Court, that was previously unavailable. This requirement aligns with the Supreme Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010), which held that a § 2255 motion is considered "second or successive" if a prior petition was decided on the merits. Recently, the Supreme Court ruled in *Garza v. Idaho* 139 S. Ct. 738, 746 (2019), that a defendant's signed appeal waiver cannot serve as an absolute bar to all appellate claims. This ruling suggests that issues about waivers are procedural errors, not substantive ones.

However, the court in *Gonzalez v. Crosby* 545 U.S. 524 (2005) held that district courts might only use Rule 60(b) as a mechanism to reevaluate a prior collateral ruling when the claim exists as a procedural issue, not a substantive one. It's important to distinguish between procedural and substantive issues when deciding if a prior ruling can be challenged using a Rule 60(b) motion. If a pro se habeas petition, claiming ineffective assistance of counsel, has already been denied, the district court must determine the Rule 60(b) status of any new filing.[24] The new filing must address procedural flaws filed in the district court.[25]

Doss argues that a pro se post-habeas submission can be construed as a Rule 60(b) motion when it challenges alleged procedural errors. Doss also claims that the court understood his letter from January 2020 was a request to file another § 2255 motion. Doss argues that the district court misunderstood the content of his letter. He argued that the procedural error lay with the district court failing to look beyond "the label" applied by the pro se party to the substance of the Letter. And that the district court should have evaluated whether the Letter could be considered a Rule 60(b) motion. Here, Doss's argument that the district court's omission in failing to assess the

[24] United States v. Thomas, 713 F.3d 165, 168-69 (3d Cir. 2013).
[25] Gonzalez, 545 U.S., at 532-33, 535-36.

Letter as a Rule 60(b) motion, rather than the substance of the letter itself, constituted a procedural error. While this argument holds merit, it lacks the depth and nuance of the Government's argument.

The Government posits that Doss's direct appeal is merely a potential procedural error as the waiver only prohibited a direct appeal to the Third Circuit – not the district court. Furthermore, no collateral attack waiver prohibited the district court from considering Doss's § 2255 motion. The Government advances that since the waivers did not bar a collateral attack but only a direct appeal to the Third Circuit, Doss cannot demonstrate that the district court employed a procedural bar to avoid addressing the motion "on the merits." Doss neglects to address the substantiveness of an ineffective assistance claim that depends on prior counsel's unwillingness to file a notice of appeal. Therefore, the Government maintains that the absence of a collateral attack waiver and the substantive nature of this ineffective assistance claim demonstrate that the district court did not utilize a procedural bar when evaluating Doss's Letter.

Doss neglected to address how the lack of a collateral attack waiver did not bar the district court's consideration of his § 2255 motion. This gap in his argument creates a substantive issue, as the district court could review the motion on the merits. The district court's review of the motion on the merits suggests that it conducted a substantive analysis by using the *Strickland* analytical framework to determine the merit of Doss's ineffective assistance claim. Therefore, it seems the government is correct regarding this issue, as the district court did not apply the appeal waiver in any way that invoked a procedural bar.

Did Doss's January 2020 Letter Attack the Procedure Used to Dispose of His § 2255 Motion?

Doss argues that his letter challenged the district court's focus on the "mere existence" of an appeal waiver.[26] He also argues that the district court used the waiver as an absolute bar to the appellate court.[27] Doss asserts that his letter did not add a new theory of relief from his conviction or challenge the validity of his direct appeal waiver.[28] But he confined the letter to a waiver application question—pointing to a procedural error by the district court—like *Webb* and *Pease*.

[26] Appendix, JA0035
[27] Id.
[28] JA0035-37

So Doss argues that his January 2020 Letter attacked the procedure used to dispose of his § 2255 motion. But the government argues that the letter does not attack the procedure used by the district court.

The government asserted that Doss tried to use a change in the substantive law to get the district court to reevaluate its previous holding under the previous law—about its denial of his § 2255 letter. And the district court was correct to reevaluate the change in the law. But *Gonzalez* held that appealing a denial of a § 2255 motion based on a change in substantive law constitutes not a procedural error but a substantive one.[29] So the government argued that the example in *Gonzalez* regarding when the appeal of a § 2255 motion for a change in substantive law is like what Doss did with his letter. Doss wanted to apply the *Garza*, *Webb*, and *Pease* here as precedent seemingly changed with *Garza*. But even if the precedent changed with *Garza*, reevaluating the change would be a substantive issue. The government analysis here seemed correct as Doss tried to apply the new law (*Garza*) to the previous district court ruling, which would be a substantive ruling, according to *Gonzalez*.[30]

Is The Denial of Doss's Initial § 2255 Motion Substantive?

Doss makes a compelling argument that the court should adopt the Fifth and Eleventh Circuit application in *Gonzalez*, which holds that a Rule 60(b) motion might appropriately challenge a procedural, waiver-based denial of an initial habeas petition.[31] He also contends that *Garza* held that an appeal waiver might give rise to a procedural ruling when the claim asserts ineffective assistance of counsel for failure to file a notice of appeal.[32] This argument relied on Doss's assertion that the district court denied his motion based on the presence of a direct appeal waiver in the plea agreement—a procedural issue. Consequently, Doss posits that the district court's review of the waiver and its use in resolving the Letter's Rule 60(b) status constitutes a procedural decision. According to Doss, the ruling in his favor by the Third Circuit would not be unprecedented, given that other circuits and even the Supreme Court have issued comparable rulings. However, the Government does not agree with Doss's contentions.

[29] Gonzalez, 545 U.S. at 532-33.
[30] Id.
[31] Webb, 940 F.3d at 898; Pease, 768 F. App'x at 976; Gonzalez, 545 U.S. at 531-32.
[32] 139 S. Ct. 738, 744-45, 750.

The Government argued that the district court's application of the *Strickland* analytical framework to deny Doss's initial § 2255 motion constituted a substantive decision. The argument started with the district court assessing the counsel's ineffective assistance. As there is no challenge to the direct appeal waiver by Doss, the district court reasoned that Doss's counsel was within reason to file for an appeal. Applying for an appeal would have Doss and his counsel violate the plea agreement. The Government then argued that the district court did not refuse to look at counsel effectiveness but incorporated the appeal waiver in its ruling as a reason for Mr. Yaninek, Doss's counsel, not to file it. The government argued that the district court discussed the merits of Doss's three other "asserted bases" for claiming he received ineffective assistance from counsel, which further supported that the district court's ruling was substantive, not procedural. The government's argument here is, therefore, correct. Doss made several legal analytical errors in this case.

He misunderstood both the presiding case law and the facts at hand and failed to address the district court's substantive analysis. The government does apply the *Strickland* framework, a substantive analysis, and finds that counsel was effective. Mr. Yaninek, counsel to Doss, knew that the plea agreement contained a direct appeal waiver. For him to file, a direct appeal would have him violate the plea agreement. It appeared Yaninek had no desire to conduct that task as it would violate the plea agreement. And according to the district court, Yaninek remained "well within the wide range of reasonable professional assistance." So Doss's lack of addressing the district court's application of *Strickland* does render his argument weak. And it does not refute the government's analysis.

Should the Court Remand to Provide the District Court an Opportunity to Apply Recent Supreme Court Precedent?

Doss argues that the court should remand to provide the district court with an opportunity to apply the recent Supreme Court precedent. Rule 60(b) provides a well-recognized avenue for the district court to consider a change in decisional law and other equitable factors to correct an earlier procedural ruling.[33] Doss continues to argue that the district court is the appropriate forum first to analyze the equitable circumstances in deciding whether to afford relief as the district court

[33] Satterfield v. District Attorney of Philadelphia, 872 F.3d 152, 162 (3d Cir. 2017).

oversees the briefing and factfinding involved in a request for Rule 60(b) relief. But the government argues that this case should not go to the district court as Doss has misconstrued the presiding case law.

The government argued that the cases Doss cited did not support that a decision is automatically procedural because it refers to an appeal waiver regardless of its role in the analysis. The cases only support that a § 2255 motion denial is procedural as a court uses waiver to bar consideration of the merits raised by a defendant. And a reading of these cases seems correct as the district courts in these cases did not provide a substantive analysis via the *Strickland* analytical framework to determine counsel effectiveness. In addition, the government's argument that Doss misconstrued the caselaw remains plausible. The district court here applied a substantive analysis and ruling in denying Doss's Letter. So the Court should not remand the case to the district court as the precedent Doss used is not analogous to this case.

Conclusion

In short, the issue presented in this case is whether a pro se post-habeas submission challenging procedural deficiencies in a prior habeas proceeding can be classified as a Rule 60(b) motion. After a thorough analysis of the legal and factual issues at play, I recommend that the district court's denial of Doss's initial § 2255 motion constituted a substantive decision. Therefore, the district court lacked the jurisdiction to consider Doss's January 2020 Letter as a Rule 60(b) motion. While Doss makes a compelling argument that the court should adopt the Fifth and Eleventh Circuit application in *Gonzalez*, this case is distinguishable from those cases because the district court here applied a substantive analysis and ruling in denying Doss's Letter. Ultimately, the district court applying the *Strickland* analytical framework suggests that Doss's claim was not a procedural error but a substantive one. Therefore, the district court must treat it as a second or successive § 2255 petition.

Overall, this case highlights the complex and nuanced legal issues surrounding post-habeas proceedings and the application of Rule 60(b) motions. It also underscores the importance of understanding the substantive versus procedural nature of legal claims and the impact that has on a court's jurisdiction over a case.

Question for Counsel at Oral Argument

Question for Appellants, Darnell Doss

1. Do you consider the District Court's use of the *Strickland* analytical framework as a substantive analysis? If so, how is the district court's ruling not substantive?
2. Does a pro se post-habeas submission challenging procedural deficiencies in a prior habeas proceeding fall under the purview of Rule 60(b) if it seeks to reopen the earlier proceeding?
3. You contend that this court should adopt Gonzalez's Fifth and Eleventh Circuits application. Why should this court adopt these cases if the district court in neither case used the *Strickland* analysis

Questions for Appellees, The United States

1. How did the district court look beyond "the label" of the waiver if all it did was assume that Mr. Yaninek did not file the appeal because he knew there was a direct appeals waiver so that it would breach the plea agreement? How does this case differ from *Webb* and *Pease*?
2. Given the facts here, how should the court apply *Garza*? As that case held, a direct appeal waiver might give rise to a procedural ruling when the claim asserts ineffective assistance of counsel for failure to file a notice of appeal.
3. Doss argued that it was the district court's failure in not assessing whether the Letter constituted a Rule 60(b) motion, not the substance of the letter itself, that was the procedural error. If the district court failed to determine whether the Letter constituted a Rule 60(b) motion, then is that not a procedural error, as the court did not address the issue?

Applicant Details

First Name	**Shannon**
Middle Initial	**E**
Last Name	**Eagen**
Citizenship Status	**U. S. Citizen**
Email Address	**eagens@lawnet.uci.edu**
Address	**Address** Street **52 Columbia** City **Irvine** State/Territory **California** Zip **92612** Country **United States**
Contact Phone Number	**2484709182**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**May 2013**
JD/LLB From	**University of California, Irvine School of Law** **http://www.law.uci.edu**
Date of JD/LLB	**May 5, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**UC Irvine Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**UCI Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kaye, David
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year student at the University of California, Irvine School of Law, writing to apply for a clerkship in your chambers for the 2024–2025 term. I first became interested in clerking because of my strong desire to pursue litigation at the highest level. I know that clerking for you would be an invaluable experience, and I would be honored to join your chambers.

Since entering law school, I have pushed myself to hone my legal research and writing skills. Inside the classroom, I earned the Faculty Award for the highest grade in both semesters of my first-year legal research and writing course. My professor for that course, Cindy Thomas Archer, then asked me to work as one of her research fellows the following year, helping 1L students with their own legal writing journeys.

Outside of the classroom, I have continued to develop my skills through my work on the UC Irvine Law Review. In my first year on law review, I served as a Lead Articles Editor, and this spring I was promoted to Articles Editor. This means I am not only tasked with above- and below-the-line editing, but also with shaping the journal by helping select articles for publication. I also participated in Moot Court this year, where I advanced to the final round of Oral Arguments. I had the distinct privilege of arguing in front of three Judges from the Ninth Circuit Court of Appeals. I was awarded runner-up for best oralist, best written brief, and best overall advocate.

My summer positions similarly echo my commitment to quality legal research and writing. In my search for firms, I have prioritized employers who provide opportunities for early responsibility. I spent the first four weeks of this summer working at Susman Godfrey, where my final work assignment was drafting an appellate response motion. I look forward to completing similarly challenging and rewarding assignments at Munger, Tolles & Olson, before returning to Irell & Manella later this summer.

In my life before law school, I pursued professional acting in New York and Los Angeles while also working in restaurants. My varied work and life experience has given me a unique perspective and a keen ability to work well with folks from all backgrounds. I hope that this perspective and ability will be helpful working alongside others in chambers and in carrying out the work of the Court.

Enclosed please find my resume, transcript, writing sample, and letters of recommendation from Professors Cindy Thomas Archer, David Kaye, and Tony Reese. Please let me know if you require any additional information. Thank you for your time and consideration.

Sincerely,

Shannon E. Eagen

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

EDUCATION

University of California, Irvine School of Law, Irvine, CA
Juris Doctor expected May 2024, GPA 4.1
Honors: Faculty Award (highest grade in class): Lawyering Skills I & II, Statutory Analysis, International Legal Analysis, Copyright, Directed Research, Criminal Trial Advocacy
Dean's Award (second highest grade in class): Legal Profession, C.A.S.S.T.E.
Pro Bono Achievement Award (20+ hours completed as a 1L)
Activities: *UC Irvine Law Review*, Articles Editor (2023–24), Associate Editor (2022–23)
Moot Court, *Runner-Up Best Oralist, Runner-Up Best Brief, Runner-Up Best Advocate*
Public Interest Law Fund, *Fundraising Chair*
Intellectual Property Law Society, *Trademark Chair*
Pro Bono: Transforming Justice Orange County: Incarcerated Letter-Writing, *Project Leader*

University of Michigan, Ann Arbor, MI
Bachelor of Arts in Communication Studies, GPA: 3.97, *Highest Distinction*, May 2013
Bachelor of Fine Arts in Theatre Performance, GPA: 3.94, *Highest Honors*, May 2013
Honors: University Honors 2008–2013; James B. Angell Scholar, 2010, 2012, 2013

LEGAL EXPERIENCE

Munger, Tolles & Olson, Los Angeles, CA — May 2023–Present
Summer Associate. Assist in legal research and drafting while embedded on a trial team defending multiple nuisance and negligence suits. Drafted a motion in limine seeking to exclude C-Suite salary information in employment suit.

Susman Godfrey, Los Angeles, CA — May 2023
Summer Associate. Wrote initial draft of appellate response brief for a pro bono case; drafted memorandum and proposed pleadings for thirty-eight affirmative defenses in response to a complaint; conducted legal research to assist in drafting a motion to compel.

Irell & Manella, Newport Beach, CA — May 2022–July 2022; July 2023–August 2023
Summer Associate. Assisted associates and partners with a particular focus on Intellectual Property matters. Drafted memorandum assessing claims and defenses for a trademark matter; researched a novel theory of damages for active copyright litigation; assisted on numerous patent matters.

University of California, Irvine School of Law, Irvine, CA — August 2022–May 2023
Research Fellow to Professor Cindy Archer. Assisted Prof. Archer in assessing and improving the legal research and writing skills of first-year students. Shared written and oral feedback on student drafts.

University of California, Irvine School of Law, Irvine, CA — January 2023–May 2023
Intellectual Property, Arts & Technology Law Clinic Certified Law Student. Conducted research and drafted memoranda on the CCPA and trade secrets. Engaged in fair use counseling for documentary filmmakers. Worked with a legislative advocacy group focused on excluding rap lyrics in trials.

SELECTED NON-LEGAL EMPLOYMENT

Granville Restaurant, Pasadena, CA — July 2016–June 2021
Associate Manager, Lead Server/Trainer, Office Supervisor. Managed dining service and maintained office operations at a high-volume casual gourmet restaurant. Communicated with guests, servers, and kitchen staff to ensure exceptional service.

Manhattan Theatre Club, New York, NY — March 2015–June 2015
Ensemble, Lead Understudy. Performed in Tony-Nominated Broadway production of *Airline Highway.*

SKILLS AND INTERESTS

Conversational French, WordPress, audio editing. Bouldering, tennis, yoga, fiction, sketch comedy.

SHANNON ELIZABETH EAGEN

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Previous Degrees

B.A. 05/13 U MICH-ANN ARBR

Memoranda

LAW 506A – FACULTY AWARD – FALL 2021

LAW 507 – DEANS AWARD – FALL 2021

LAW 503 – FACULTY AWARD – SPRING 2022

LAW 505 – FACULTY AWARD – SPRING 2022

LAW 506B – FACULTY AWARD – SPRING 2022

PRO BONO – 1L ACHIEVEMENT (20+ HRS) – 2021-22

LAW 545 – FACULTY AWARD – FALL 2022

LAW 5702 – DEANS AWARD – FALL 2022

LAW 299 – FACULTY AWARD – SPRING 2023

LAW 5941 – FACULTY AWARD – SPRING 2023

2021 Fall Semester

PROCEDURAL ANALYSIS	LAW	504	4.0	A	16.0	
COM LAW: CONTRACTS	LAW	500	4.0	A	16.0	
LAWYERING SKILLS I	LAW	506A	3.0	A+	12.9	
LEGAL PROFESSION	LAW	507	3.0	A+	12.9	
LEG RESEARCH PRAC	LAW	508	1.0	S	0.0	SU
Term Totals	**ATTM:**	**14.0**	**PSSD:**	**14.0**	**GPTS:** **57.8**	**GPA: 4.129**
Cumulative Totals	**ATTM:**	**14.0**	**PSSD:**	**14.0**	**GPTS:** **57.8**	**GPA: 4.129**

2022 Spring Semester

CON LAW	LAW	502	4.0	A-	14.8	
COMMON LAW: TORTS	LAW	501	4.0	A	16.	
STATUTORY ANALYSIS	LAW	503	3.0	A+	12.9	
LAWYERING SKILLS II	LAW	506B	3.0	A+	12.9	
INT'L LEGAL ANALY	LAW	505	3.0	A+	12.9	
Term Totals	**ATTM:**	**17.0**	**PSSD:**	**17.0**	**GPTS:** **69.5**	**GPA: 4.088**
Cumulative Totals	**ATTM:**	**31.0**	**PSSD:**	**31.0**	**GPTS:** **127.3**	**GPA: 4.106**

SHANNON ELIZABETH EAGEN
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2022 Fall Semester

EVIDENCE	LAW	514	3.0	A	12.0	
C.A.S.S.T.E	LAW	5702	2.0	A	8.0	
COPYRIGHT LAW	LAW	545	4.0	A+	17.2	
CUR ISS ANTITRUST	LAW	5122	1.0	S	0.0	SU
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	SU
LAW REVIEW	LAW	598R	1.0	S	0.0	SU

Term Totals **ATTM: 9.0 PSSD: 9.0 GPTS: 37.2 GPA: 4.133**

Cumulative Totals **ATTM: 40.0 PSSD: 40.0 GPTS: 164.5 GPA: 4.113**

2023 Spring Semester

INTRO CA FED & LOC	LAW	5143	1.0	A	4.0	
ENTERTAINMENT LAW	LAW	535	2.0	A	8.0	
CRIM TRIAL ADVOCACY	LAW	5941	2.0	A+	8.6	
INTELL PROP CLINIC	LAW	597P	6.0	A	24.0	
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	SU
DIRECTED RESEARCH	LAW	299	2.0	A+	8.6	
LAW REVIEW	LAW	598R	1.0	S	0.0	SU

Term Totals **ATTM: 13.0 PSSD: 13.0 GPTS: 53.2 GPA: 4.092**

Cumulative Totals **ATTM: 53.0 PSSD: 53.0 GPTS: 217.7 GPA: 4.108**

INCOMPLETE GRADES:	0	**UNITS:**	0.0
NR GRADES:	0	**UNITS:**	0.0
P/NP GRADES:	0	**UNITS:**	0.0
S/U GRADES:	6	**UNITS:**	8.0
W GRADES:	0	**UNITS:**	0.0

GRADE UNITS ATTEMPTED	53.0	**GRADE POINTS**	217.7	**UC GPA**	4.108
TOTAL UNITS PASSED	53.0	**UNITS COMPLETED**	61.0		

********* THIS IS NOT AN OFFICIAL TRANSCRIPT ********

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GRADING

Letter Grade:		Grade Points: (per unit)	
A +, A, A-		4.3, 4.0, 3.7	
B +, B, B-		3.3, 3.0, 2.7	
C +, C, C-		2.3, 2.0, 1.7	
D		1.0	
F		0.0	No unit credit awarded.
S	...Satisfactory	0.0	Equivalent to a grade C- or better. Not calculated in the GPA.
U	...Unsatisfactory	0.0	Equivalent to a grade D or lower. Not calculated in the GPA.
I	...Incomplete	0.0	Coursework still in progress.
IP	...In Progress	0.0	Multiple term course, graded upon completion.
NR	...No Report	0.0	No grade submitted by instructor or an unresolved discrepancy in course enrollment.

EXPLANATION OF CODES

SU	...Satisfactory/Unsatisfactory	Course taken for credit only.
U1	...Excluded from GPA	Does not apply toward law degree GPA.
WC	...Workload Credit Only	Does not apply toward graduation.

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to provide the strongest recommendation for Ms. Shannon Eagen as a judicial clerk in your chambers. Shannon is an exceptional legal thinker and writer, earning the highest grade in my 1L course and writing a publishable-quality paper in a directed research during her second year. A look at her transcript confirms her excellence. I have every expectation that Shannon, who is also extremely articulate in oral presentation and argument, will be a leader in the law.

During her first year, Shannon earned the highest grade in my International Legal Analysis course, a course of about forty-five students focused on public international law (treaty interpretation, customary international law, global case law, U.S. foreign relations law, and key topics such as climate, humanitarian law and human rights, and dispute settlement). I should emphasize that she really earned it. Unlike some students, who came with a strong interest or background in international relations, Shannon told me early on that she wanted to learn something different notwithstanding her limited background in global issues. Throughout class, she consistently asked exactly the kinds of questions that pushed me to be a better teacher, clearer in my explanations. She came to office hours to drill down into difficult concepts. She asked hypotheticals! Grading of such courses is, of course, anonymous, but I was not surprised when it turned out that she had the highest grade in an exam that mixed up long issue-spotter questions with short questions designed to test knowledge and comprehension.

During the spring of her second year, Shannon asked if I would supervise her writing requirement, for which she said she wanted to learn how to write persuasive legal scholarship and address privacy and freedom of expression in the digital age. She read widely to identify a topic, and she ended up writing an excellent paper exploring emerging internet regulation in the European Union. The topic is not uncomplicated, as European law involves a web (as it were) of directives promoting expression and innovation while also constraining speech and corporate behavior in areas related to competition, copyright, hate, terrorism and child endangerment. She handled the issues with real sophistication, explaining the foundational rules before getting into the newly adopted laws related to transparency and ‘harmful’ speech (the Digital Services Act). Ultimately, she produced both a guide to key elements of EU internet law while also showing how the new legal rules are both in dialogue and in some conflict. It would be a great paper by a scholar or practitioner; that it was developed and written by a student just underscores her talent, work ethic, thoughtfulness, and analytical rigor.

I imagine that other referees will speak to her other successes in Law School, such as her extraordinary performance in the moot court competition, her work as a fellow for legal research and writing, and her law review leadership. But I also want to emphasize the clear joy she brings to learning. She brings an excitement to her work, whether in the writing or in the classroom. It’s obvious that she enjoys the law and solving the puzzles it presents. She has a background in theater, and it’s possible to see how that creativity plays a role in the way she conceives problems; it’s also possible to see how she has channeled her skills as a performer into oral argument. She is unafraid to present her case (or her questions) publicly, and she seems to revel in the engagement with others. She also has outside interests, in theater, film, literature and much else, which gives her a well-rounded quality that law school has not dimmed.

Shannon is a gifted thinker and talented advocate, one of the strongest students I have taught in nearly twenty years (and I say that while she is in a class of students that is genuinely exceptional). I cannot recommend her strongly enough for any judge’s chambers.

Please feel free to contact me if you have any questions. Thank you so much.

With best regards,
David Kaye
Clinical Professor of Law
United Nations Special Rapporteur on the Freedom of Opinion and Expression (2014 - 2020)

David Kaye - dkaye@law.uci.edu

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am very pleased to write to you in support of Shannon Eagen, who is applying for a clerkship with you for the 2024–25 term.

I taught Shannon in my Copyright Law course in Fall 2022. That class enrolled 25 students, so it gave me the opportunity to get to know the students fairly well. Shannon stood out as an excellent contributor in this class throughout the semester. I rely on volunteers in class discussions, and while Shannon was one of the most active class participants over the course of the semester, she never attempted to monopolize the discussion—indeed, her participation often came when she raised her had to respond to a difficult question after no one else in the class volunteered. When Shannon spoke, she was clearly thoughtful about the issues at hand, and her remarks were uniformly responsive and insightful and always helped to further the discussion that was underway. Shannon's classroom comments displayed an excellent ability to understand, analyze, and discuss a judicial opinion and its implications, as well as to parse and apply complicated statutory language. I count participation as a small part of the final grade in the course, and Shannon had the highest participation grade for the semester. I am sure that Shannon would bring the same sharp analytical thought to the consideration of cases as a clerk.

Given her class performance, I was pleased, but not surprised, that Shannon earned the highest grade in the class (and thus the Faculty Award given for the top grade). The exam consisted of both multiple-choice questions and a traditional issue-spotting essay question, and Shannon did extremely well on both parts. This demonstrates that she is able to understand and apply legal rules and also to analyze fact patterns in order to identify legal issues and the facts relevant to resolving those issues. Her performance on the essay portion of the exam reflects both that she spotted more issues than most students did and that she analyzed those issues better than most other students did.

Shannon's transcript shows that her superior performance in my class was not an anomaly, as she has compiled a stellar academic record in her first four semesters at UCI Law, earning a cumulative GPA of 4.092. In all 17 of her 17 graded classes, she earned grades in the "A" family, including 8 "A+" grades, 8 "A" grades, and only 1 "A-" grade. (The other classes, in which Shannon earned an "S" ("Satisfactory") grade, were only offered to students on a pass/fail basis.) Indeed, in 9 of those 17 graded classes she won course awards for the highest grade (Faculty Award) or second highest grade (Dean's Award) in the class. She earned those "A" grades in a good cross-section of courses—required first-year classes, large upper-level classes, smaller specialized upper-level courses, a small seminar, lawyering and advocacy skills classes, and the intellectual property clinic—and her course awards were in doctrinal courses (Legal Profession, Statutory Analysis, International Legal Analysis, Copyright Law), a seminar (C.A.S.S.T.E), and legal writing and skills courses (Lawyering Skills I & II and Criminal Trial Advocacy). Clearly, Shannon does not excel only in one particular subject, setting, or teaching style.

Although the Law School does not reveal class rank to students, we do calculate class rank for purposes of clerkship applications. The Assistant Dean for Student Services informs me that Shannon is ranked 1st in her class of 166 students, which represents a significant academic achievement.

Earlier this spring, I was able to watch Shannon in the final round of the Law School's annual Moot Court competition, in which she and one other student argued a case before a panel of three Ninth Circuit judges. Although she was the runner up, it was a very close round and Shannon's performance was outstanding. It showed that she is able to put what she has learned in the classroom into practice at a very high level.

In my interactions with her outside of class, I have found Shannon to be consistently friendly, professional, and courteous. Overall, I think that she would be an excellent law clerk (based on my time at UC Irvine as well as 10 years of teaching—and advising students on clerkships—at The University of Texas, Stanford, and NYU law schools). Shannon is intelligent and talented in the legal analysis skills that are so essential to a clerk's ability to assist a judge. I have no doubt she would be congenial in relationships with other members of chambers, responsible in carrying out her duties, and professional in her interactions with judges, attorneys, litigants, and court personnel.

If I can be of further assistance in your consideration of Shannon's application, please feel free to contact me by phone at 949/824-4745, or by e-mail at treese@law.uci.edu.

Sincerely yours,

R. Anthony Reese
Chancellor's Professor of Law

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I unequivocally recommend my former student Shannon Eagen as a judicial clerk in your chambers because she truly stands out above the many students vying for such a position. When Ms. Eagen approached me requesting support for her application, I did not hesitate. Her performance in my class reflected the attitude and work ethic necessary to be a successful attorney. She is intelligent, hardworking, focused, and determined. Equally important is the fact that Shannon is professional, inquisitive, and an effective team member. Shannon will not only benefit professionally from the opportunity to be a clerk on your staff, but I have no doubt she will contribute to the intellectual and professional environment there.

I have had the opportunity to become acquainted with Ms. Eagen in two capacities. First, in spring 2022, she was a student in my Lawyering Skills II course, at the University of California, Irvine School of Law. Secondly, I asked her to be a T.A. the following year for the same class in fall and spring.

Even before I met Shannon in class, I was made aware of the lasting impression she had made on her professor from the fall semester. When I asked him for examples of students' work from the fall semester, he replied, "Well, of course, you must start with Shannon Eagen's research memo. Her work is some of the best I have seen in decades." When I reviewed her work myself, it was clear to me he had not exaggerated. After one semester, she was already producing work with thorough and nuanced analysis akin to that of a summer associate. And yet, when I met her in spring, she was confident, but humble and curious, and eager to continue to learn. Lawyering Skills I and II are each intensive semester-long courses that focus on developing both legal reasoning and analysis and written and oral communication skills. Students research and draft multiple legal memoranda, professional emails, a client letter, and a demand letter. In spring they draft a Memorandum of Law in support of a motion and practice their oral communication skills through a live client interview, simulated supervisor research conferences, and a motion hearing.

It was apparent from the start that Shannon entered law school with advanced communication skills and a thoughtful and logical approach to legal reasoning. She started at the top of the class in Lawyering Skills from the first graded assignment and remained at the top all the way through earning the highest grade in the spring semester. Yet, she worked hard and diligently with every assignment and was always willing to wrestle with the difficult concepts.

In a normal year, the Lawyering Skills courses are two of the most time consuming and challenging in the 1L curriculum. Students, like Shannon in the class of 2024, however, had to work through these challenges during a pandemic, wildfires in Orange County, protests against racial injustice, and a very contentious election. They were challenged to learn, practice, and comprehend a significant amount of information in person at times and other times on an online platform while balancing a perfect storm of challenges the likes of which we have not seen in our lifetime. Because of Shannon's maturity and focus, she is one of those rare students who hit the ground running from day one and never missed a beat.

At the end of each school year, I choose five students to help as T.A.s for the next school year. Not taking a chance that Shannon may or may not apply, I reached out to her directly to ask her to help. Choosing a T.A. is not merely about choosing a student who excels at the work herself but choosing a student who also has the emotional intelligence to assist and encourage students who do not comprehend the information as easily. They must also be organized and able to work independently hosting weekly office hours and providing written feedback on drafts. Shannon was a favorite among my students this past year. I reviewed her feedback to students, and it was instructive without doing the work for the students. And students were all comfortable being vulnerable with her because of her encouraging approach. She held regular office hours and provided timely feedback each week despite her many other commitments. For example, while preparing for her own final argument in the UCI moot court competition, for which she received second place, she volunteered to do a presentation for my class and to create a handout with oral advocacy pointers.

Finally, I think Ms. Eagen stands out for her commitment to the community. She was a leader with PILF at UCI raising money for students to engage in unpaid public interest work. Shannon is a rare combination of academic aptitude, professionalism and maturity, and selfless commitment to the community. An equally important consideration is the fact that Shannon has personal characteristics that would make her a pleasant person to work with. Shannon is not only dependable and diligent, but considerate. And I have never known anyone to question her integrity.

Please contact me if I can provide any further assistance. I recommend Shannon Eagen without hesitation.

Sincerely,

Cindy Archer

Professor of Lawyering Skills

Cindy Archer - carcher@law.uci.edu

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WRITING SAMPLE COVER SHEET

The attached writing sample is an excerpt from my brief for the UC Irvine School of Law's internal Moot Court competition. I am the sole author and editor of this section of the brief.

This competition was based on a fictional case of first impression before the United States Supreme Court, *Dr. Helen Croix v. Aguefort University*. Dr. Croix was a tenured medical professor at Aguefort University, a prestigious public research university. In July of 2020, Dr. Croix posted on her blog advocating for the use of hydroxychloroquine to treat COVID-19. Her post also urged readers to ignore governmental masking, quarantine, and social-distancing mandates. This post went viral. A local physician followed Dr. Croix's advice in treating a patient, which ultimately resulted in the death of the patient and a wrongful death suit against the physician. The wrongful death trial referenced Dr. Croix and her post, which led to significant disruption on the Aguefort campus. After student protests, concerned calls from donors, and an alumni letter calling for Dr. Croix's resignation, the Dean of the School of Medicine reached out to Dr. Croix to discuss the situation. She did not respond to his email for two weeks, at which point he terminated her. Dr. Croix then sued the University, raising two claims: (1) that she was retaliated against in violation of her free speech rights; and (2) that her liberty interest in her reputation was infringed in violation of her due process rights.

The fictional District Court for the District of Elmville granted Aguefort University's 12(b)(6) motion to dismiss both claims. On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded the case. The University petitioned the Supreme Court. The court granted certiorari to decide whether the University infringed upon Dr. Croix's Fourteenth Amendment liberty interest in her reputation and whether the University violated her First Amendment free speech rights.

For the written portion of the competition, my partner and I were assigned to argue on behalf of the petitioner, Aguefort University. Throughout the course of the oral arguments, I alternated between arguing for the University and for the respondent, Dr. Croix. I was responsible for the Fourteenth Amendment section of the brief, which appears on the following pages. This was an "open universe" assignment. I have eliminated the citations to the exhibits and factual record from the brief for ease of reading.

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I. AGUEFORT DID NOT INFRINGE UPON DR. CROIX'S FOURTEENTH AMENDMENT LIBERTY INTEREST IN HER REPUTATION BECAUSE THE UNIVERSITY DID NOT ISSUE DEFAMATORY STATEMENTS AND IT PROVIDED HER WITH ADEQUATE DUE PROCESS.

Dr. Croix has failed to state a claim for a violation of her Fourteenth Amendment rights as a matter of law. Aguefort University did not deprive Dr. Croix of her constitutionally protected liberty interest in her reputation following her termination because the University did not defame her, and she has not suffered an alteration in legal status. Further, the University provided Dr. Croix sufficient notice and an opportunity to be heard prior to termination. This Court should therefore reverse the Ninth Circuit's decision and reinstate the District Court's grant of Petitioner's Motion to Dismiss.

This Court has consistently held that damage to reputation alone, without impact on "some more tangible interests such as employment," is insufficient to trigger "the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 573–74 (1972); *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Courts may require an extensive pretermination hearing process where a public employer imposes a "stigma" on a former employee that "forecloses his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573–74.

Here, the University's Press Release did not prevent Dr. Croix from seeking future employment. Her medical license remains intact, and she is free to take advantage of other employment opportunities in the medical field. Dr. Croix specifically alleges that statements in the Alumni Letter were stigmatizing to the point of being defamatory. This argument, however, is unavailing. The Alumni Letter does not implicate the University in defamation because the alumni's fiery rhetoric and hyperbolic language were expressions of opinion—not fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (recognizing the limits on the types of speech that give rise to defamation). *See also*, *Greenbelt Cooperative Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970) (declining to find defamation where the statement was "no more than rhetorical hyperbole").

Even assuming that Dr. Croix's dismissal triggered protection under the Fourteenth Amendment, the University provided her with the procedural and substantive process she was due under the circumstances. Dr. Croix was put on notice by the Dean of the School of Medicine that she was facing serious allegations, and she was given an opportunity to meet and discuss these allegations. Dr. Croix chose to forgo that opportunity. Given the urgent need of the University to promote public health and maintain order on campus, this provision of notice and an opportunity to be heard was a sufficient procedural safeguard in Dr. Croix's termination.

Dr. Croix's claim that Aguefort University intruded upon her Fourteenth Amendment liberty interest fails as a matter of law because she was neither defamed nor denied adequate due process.

A. Dr. Croix Was Neither Defamed nor Suffered Any Alteration in Her Legal Status.

Aguefort University's dissemination of the Press Release following Dr. Croix's dismissal did not infringe upon her liberty interest in her reputation because the release was not defamatory, and Dr.